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"*In re Crawshay, decd.* (*No.* 2), p. 356. At p. 357, immediately before " *Geoffrey* " *Cross* for the defendant Mrs. Spiller " insert " *C. D. Myles* for the defendant " Mrs. Greener submitted the four propositions to be extracted from *In re Wright* (3) " which are set out in the judgment at p. 369 infra."

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Succession Duty Act (16 & 17 *Vict., c.* 51), *s.* 2. *In re* MILLER'S AGREEMENT. UNIACKE *v.* ATTORNEY-GENERAL **Wynn-Parry J. 615**

1875-1883.

Public Health (*Support of Sewers*) *Amendment Act* (46 & 47 *Vict., c.* 37), *ss.* 4, 5. NEWCASTLE-UNDER-LYME CORPORATION *v.* WOLSTANTON, LD.
Evershed J. 92
C. A. 427

1882.

Settled Land Act (45 & 46 *Vict., c.* 38), *s.* 22, *sub-s.* 5. - *In re* MIDLETON'S SETTLEMENT. COTTESLOE (LORD) AND LOYD *v.* ATTORNEY-GENERAL AND MIDLETON (EARL)
Roxburgh J. 329
C. A. 583

1894.

Finance Act (57 & 58 *Vict., c.* 30), *s.* 2, *sub-s.* 2. *In re* Midleton's Settlement. Cottesloe (Lord) and Loyd *v.* Attorney-General and Midleton (Earl) **Roxburgh J. 329** **C. A. 583**

—— —— *ss.* 1, 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7; *s.* 8, *sub-s.* 4; *s.* 9, *sub-s.* 1; *s.* 14, *sub-s.* 1. *In re* Cassel's Will Trusts - . - - **Romer J. 1**

—— —— *s.* 2, *sub-s.* 1 (*b*); *s.* 5, *sub-s.* 3. *In re* Jones' Will Trusts **Roxburgh J. 48**

—— —— *s.* 2 (1) (*d*). *In re* Miller's Agreement. Uniacke *v.* Attorney-General - **Wynn-Parry J. 615**

1896.

Friendly Societies Act (59 & 60 *Vict., c.* 25), *s.* 44, *sub-s.* 1 (*e*). *In re* United Law Clerks Society **Wynn-Parry J. 131**

Judicial Trustees Act (59 & 60 *Vict., c.* 35), *s.* 1, *sub-s.* 1. *In re* Ridsdel. Ridsdel *v.* Rawlinson **Jenkins J. 597**

1908.

Friendly Societies Act (8 *Edw.* 7, *c.* 32), *s.* 4. *In re* United Law Clerks Society **Wynn-Parry J. 131**

1914.

Bankruptcy Act (4 & 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-ss.* 7 *and* 8; *s.* 42, *sub-s.* 2. *In re* Baughan. *Ex parte* Official Receiver *v.* Bennett **Romer J. 313**

—— —— *In re* A Debtor. *Ex parte* Official Receiver *v.* United Auto & Finance Corporation **Romer J. 313**

—— —— *s.* 26, *sub-s.* 2. *In re* Tabrisky. *Ex parte* The Board of Trade **C. A. 565**

1918.

Income Tax (8 & 9 *Geo.* 5, *c.* 40) *All Schedules Rules, rr.* 19 (1) *and* 21 (1). *In re* Arno, decd. **C. A. 198**

1920.

Married Women (Maintenance) Act (10 & 11 *Geo.* 5, *c.* 63), *s.* 1. *In re* Kinseth **Vaisey J. 223**

1922.

Law of Property Act (12 & 13 *Geo.* 5, *c.* 10), *s.* 15, *sub-s.* 10. *In re* Jones' Will Trusts - - **Roxburgh J. 48**

—— (12 & 13 *Geo.* 5, *c.* 16), *s.* 145; *sch.* 15, *para.* 7. Northchurch Estates, Ld. *v.* Daniels **Evershed J. 117**

Irish Free State Constitution Act (*Sess.* 2) (13 *Geo.* 5, *c.* 1), *s.* 1, *sch. art.* 73. *In re* Midleton's Settlement. Cottesloe (Lord) and Loyd *v.* Attorney-General and Midleton (Earl) - - - **C. A. 583**

1925.

Administration of Estates Act (15 *Geo.* 5. *c.* 23), *s.* 34, *sub-s.* 3, *sch. I., Part* 2, *paras.* (3), (4) *and* (8). *In re* James. Lloyds Bank, Ld. *v.* Atkins **Roxburgh J. 256**

Guardianship of Infants Act (15 & 16 *Geo.* 5, *c.* 45), *s.* 3, *sub-ss.* 2, 4. *In re* Wakeman. Wakeman *v.* Wakeman - **Jenkins J. 607**

—— —— *s.* 7, *sub-s.* 1 (*c*). *In re* Kinseth **Vaisey J. 223**

Land Charges Act (15 *Geo.* 5, *c.* 22), *s.* 6, *sub-ss.* 1 (*c*) 3, 5. *In re* A Receiving Order (In Bankruptcy) **Roxburgh J. 498**

Law of Property Act (15 *Geo.* 5, *c.* 20), *sch. I., part* iv., *para.* 1 (4). *In re* Harvey. Public Trustee *v.* Hosken - - **Vaisey J. 285**

—— —— *s.* 40. Hill *v.* Hill **C. A. 231**

—— —— *s.* 40, *sub-s.* 1. Hawkins *v.* Price **Evershed J. 645**

Trustee Act (15 *Geo.* 5, *c.* 19), *s.* 31, *sub-s.* 1. *In re* Jones' Will Trusts **Roxburgh J. 48**

—— —— *s.* 15 (*f*). *In re* Ridsdel. Ridsdel *v.* Rawlinson **Jenkins J. 597**

—— (15 *Geo.* 5, *c.* 20), *s.* 149, *sub-s.* 3. Northchurch Estates, Ld. *v.* Daniels - - **Evershed J. 117**

Workmen's Compensation Act (15 & 16 *Geo.* 5, *c.* 84). *In re* Armstrong Whitworth Securities Co., Ld. **Jenkins J. 673**

1926.

Bankruptcy (Amendment) Act (16 & 17 *Geo.* 5, *c.* 7), *s.* 1, *sub-s.* 1. *In re* Tabrisky. *Ex parte* The Board of Trade - - **C. A. 565**

1927.

Moneylenders Act (18 & 19 *Geo.* 5, *c.* 21), *s.* 9, *sub-s.* (1). *In re* Baughan. *Ex parte* Official Receiver *v.* Bennett - - **Romer J. 313**

—— —— *s.* 9 *sub-s.* (1). *In re* A Debtor. *Ex parte* Official Receiver *v.* United Auto & Finance Corporation - - **Romer J. 313**

1929.

Companies Act (19 & 20 *Geo.* 5, *c.* 23), *s.* 61. *In re* Sound City (Films), Ld. **Evershed J. 169**

—— —— *s.* 79, *sub-s.* 2 (*e*). *In re* Kent & Sussex Sawmills, Ld. **Wynn-Parry J. 177**

—— —— *s.* 294, *sub-s.* 1. *In re* Dixon, Ld. **Vaisey J. 251**

—— —— *ss.* 247, 261. *In re* Armstrong Whitworth Securities Co., Ld. **Jenkins J. 673**

1932.

Rights of Way Act (22 & 23 *Geo.* 5, *c.* 45), *s.* 1, *sub-ss.* 2, 6; *s.* 2, *sub-s.* 1. Attorney-General and Newton Abbot Rural District Council *v.* Dyer **Evershed J. 67**

Solicitors Act (22 & 23 *Geo.* 5, *c.* 37), *s.* 64, *sub-s.* 1; *s.* 66, *sub-ss.* 1 *and* 2. *In re* A Solicitor **Roxburgh J. 274**

1938.

Coal Act (1 & 2 *Geo.* 6, *c.* 52), *ss.* 6, 7, *sch. III., part* 4, *paras.* 21, 22. *In re* Duke of Leeds, deceased and *In re* The Coal Acts, 1938 to 1943. Duke of Leeds *v.* Davenport - - **Jenkins J. 525**

—— —— *In re* Lucas, deceased. Bethune *v.* Lucas - **Jenkins J. 558**

Finance Act (1 & 2 *Geo.* 6, *c.* 46), *s.* 48. *In re* Jones' Will Trusts **Roxburgh J. 48**

Inheritance (Family Provision) Act (1 & 2 *Geo.* 6, *c.* 45), *s.* 1. *In re* Inns, deceased. Inns *v.* Wallace **Wynn-Parry J. 576**

1941.

Pharmacy and Medicines Act (4 & 5 *Geo.* 6, *c.* 42), *ss.* 11, 12, 17. Potter & Clarke, Ld. *v.* The Pharmaceutical Society of Great Britain **Wynn-Parry J. 137** **C. A. 483**

1943.

Courts (Emergency Powers) Act (6 & 7 *Geo.* 6, *c.* 19), *s.* 4, *sub-ss.* 3, 4. Jarrett *v.* Barclays Bank, Ld. and Nash **Wynn-Parry J. 54** **C. A. 187**

War Damage Act (6 & 7 *Geo.* 6, *c.* 21), *s.* 1; *s.* 2, *sub-s.* 1 (*a*); *s.* 3, *sub-ss.* 1, 2; *s.* 4, *sub-ss.* 1, 2; *s.* 5, *sub-ss.* 1, 2; *s.* 6, *sub-s.* 1; *s.* 7, *sub-s.* 1; *s.* 8, *sub-ss.* 2, 4; *s.* 9, *sub-s.* 1; *s.* 10, *sub-s.* 1; *s.* 31, *sub-s.* 1 (*b*); *s.* 32, *sub-ss.* 1, 3; *s.* 123; *s.* 127, *sub-s.* 1; *Third Schedule, para.* 3 (1). *In re* 36-42 Jamaica Street, Stepney **Vaisey J. 158** **C. A. 409**

1944.

Validation of War-Time Leases Act (7 & 8 *Geo.* 6, *c.* 34), *s.* 1, *sub-ss.* 1, 6. M. W. Investments, Ld. *v.* Kilburn Envoy, Ld. **Vaisey J. 125**

—— —— *s.* 1, *sub-s.* 1, *s.* 3, *sub-s.* 3. M. W. Investments, Ld. *v* Kilburn Envoy, Ld. - - **C. A. 370**

ERRATA

Apley Estates Co., Ld. v. *De Bernales*, at p. 223, should read: *Nordon & Co.* for Respondents and *Birkbeck Julius Edwards & Coburn* for Appellants.

In re Sound City (Films), Ld. [1947] Ch. 169, at p. 171. Junior counsel for the motion was *G. W. H. Richardson*.

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re CASSEL'S WILL TRUSTS.

PUBLIC TRUSTEE AND OTHERS *v.* ATTORNEY-GENERAL AND OTHERS.

ROMER J.

1945

Oct. 25; *Nov.* 15.

1946

Feb. 25, 26; *Mar.* 15.

Revenue—Estate duty—Will—Bequest—Annuity to J. and after her death an annuity of same amount to her daughters C. and N.—Death of J.—Estate duty—Assessment—Incidence—Finance Act, 1894 (57 *&* 58 *Vict., c.* 30), *ss.* 1, 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7; *s.* 8, *sub-s.* 4; *s.* 9, *sub-s.* 1; *s.* 14, *sub-s.* 1.

A testator bequeathed various annuities by his will, in which were, inter alia, the words: "To J. . . . . an annuity of 5,000*l.* "and after her death or if she shall predecease me then from the "date of my death an annuity of 5,000*l.* to her two daughters "C. and N. and to the survivor of them." In 1921 the testator died and in 1944 J. died. Up to the date of this summons the trustees of the testator's will had paid the subsisting annuities out of his general estate and had made no appropriation to answer them:—

Held, (1.) that, on the true construction of the will, the annuity of 5,000*l.* bequeathed to J. was distinct from that bequeathed to her daughters C. and N. and that, under s. 2, sub-s. 1 (*b*) of the Finance Act, 1894, estate duty became, on J.'s death, payable on that "slice" of the testator's estate which had been required to produce her annuity; (2.) that that estate duty was proper to be borne only by that part of his residuary estate out of which the annuities were not paid, and that neither J.'s daughters nor any other of the subsisting annuitants were liable to bear any part of it.

Berry v. *Gaukroger* [1903] 2 Ch. 116; *In re Hicklin* [1917] 2 Ch. 278; *Skinner* v. *Attorney-General* [1940] A. C. 350; *Harbin*

ROMER J.

1945

CASSEL'S WILL TRUSTS, *In re.* PUBLIC TRUSTEE *v.* ATTORNEY-GENERAL.

v. *Masterman* [1896] 1 Ch. 351, and *In re Parker-Jervis* [1898] 2 Ch. 643 considered.

In re Palmer [1916] 2 Ch. 391 considered and distinguished.

ADJOURNED SUMMONS.

By his will dated July 9, 1920, Sir Ernest Cassel (hereinafter called " the testator ") provided, inter alia : " I bequeath " . . . . to . . . . Mrs. Ella Joshua . . . . an annuity of " 5,000*l.* and after her death or if she shall predecease me then " as from the date of my death an annuity of 5,000*l.* to her " two daughters Cathy and Nellie, and to the survivor of " them ; to the Honourable Mrs. Thomas Seymour Brand " while living an annuity of 600*l.* ; to her and the late Admiral " the Honourable Sir Thomas Seymour Brand's children or " child living at her death and at the death of myself an " annuity of 600*l.* to commence from her death and to continue " until the death of the last survivor of such children and to " be payable to such of them as shall for the time being be " living and if more than one in equal shares . . . . to " Mademoiselle Berthe Guillaume . . . . an annuity of 12,000 " French francs ; to her sister Mademoiselle Marie Guillaume " . . . . an annuity of 5,000 French francs to commence from " the death of the survivor of myself and the said Mademoiselle " Berthe Guillaume . . . . I devise and bequeath all the real " and personal estate . . . . of or to which I shall at my death " be possessed or entitled or which I shall at my death have " a general power to appoint by will and which shall not by " this my will or any codicil hereto have been otherwise " effectually disposed of unto . . . . my trustees . . . . upon " trust . . . ." There followed trusts to sell and convert with powers to postpone sale and conversion and to retain investments and the testator continued : " I direct that my " trustees shall . . . . pay my funeral and testamentary " expenses and debts and the legacies and annuities bequeathed " and given by this my will or any codicil hereto (the annuities " nevertheless to be payable primarily out of income and the " legacies and annuities to be paid primarily out of my personal " estate) and also the Public Trustee's fees on the capital of " my estate and all estate duty and other death legacy or " succession duties which shall at my death be ascertainable " and payable in respect of my estate and the devises gifts " bequests legacies annuities and properties given absolutely " or settled and the gifts and settlements of my residuary "estate made by or contained in this my will or any codicil "hereto to the intent that the same shall be held and enjoyed "by the persons who at my death shall become beneficially "entitled free of all such duties which are to be borne by the "capital of my residuary estate and shall be paid thereout ". . . ." Subject thereto the testator then directed his trustees to invest the proceeds of sale and to divide them and any retained properties and investments (all of which he described sometimes as "the said trust premises" and sometimes as "my residuary estate") into eight equal parts, which he dealt with as in the will mentioned. He then provided in an appropriation clause: "I authorize my trustees in case at any "time with a view to the due administration or distribution "of my estate it shall be deemed convenient so to do to "appropriate and retain a sufficient part of my estate or of "the investments representing the same for answering by the "annual income thereof the several annuities hereinbefore "bequeathed or such of them as shall for the time being be "payable but without prejudice to the powers of sale and "investment and transposing investments herein contained "and . . . . in case the income of the appropriated fund shall "at the time of appropriation be sufficient to satisfy the said "annuities such appropriation shall be a complete satisfaction "of the trust to provide for such annuities and . . . . in case "the income of the appropriated fund shall at any time . . . . "prove insufficient for payment in full of the said annuities "resort may be had to the capital thereof respectively from "time to time to make good such deficiency and the surplus "income (if any) of the said fund from time to time remaining "after payment of the said annuities shall be applicable as "income of my residuary estate and . . . . as and when any "of the said annuities shall cease a corresponding part of the "appropriated fund shall sink into my residuary estate."

On September 21, 1921, the testator died. On June 11, 1944, Mrs. Ella Joshua died, survived by her two daughters, Cathy and Nellie. Up to the date of the judgment on the second question raised by this summons the trustees had not made any appropriation to answer the annuities except those payable in French francs and Swiss francs and, at the date of that judgment, all those payable in French francs had determined. A difference arose between the Estate Duty Office and the trustees of the will as to the principle proper to be applied in assessing the estate duty which became payable on

ROMER J.

1945

CASSEL'S WILL TRUSTS, *In re.* PUBLIC TRUSTEE *v.* ATTORNEY-GENERAL.

Mrs. Joshua's death in respect of her annuity of 5,000*l.* The Estate Duty Office claimed that, on her death, there was a cesser of one annuity for 5,000*l.* in respect of which estate duty became payable under s. 2 sub-s. 1 (*b*) of the Finance Act, 1894, and a springing up of a new annuity, also for 5,000*l.*, in favour of her daughters and of the survivor of them.

The trustees, on the other hand, claimed that there was not a cesser of an annuity, but that, on Mrs. Joshua's death, there was a passing to her daughters of an annuity of 5,000*l.*, and that estate duty was payable on the value of that annuity. By this summons, which was taken out on March 28, 1945, the trustees asked, inter alia: (1.) whether, on the true construction of the Finance Act, 1894, and amending Acts, on Mrs. Joshua's death estate duty became payable (*a*) under s. 1 of the Finance Act, 1894, and only on the then value of a continuing annuity of 5,000*l.* for the lives of her two daughters and the life of the survivor of them and they were the persons accountable for that duty or (*b*) on the capital value of the slice of the testator's residuary estate required to produce an annuity of 5,000*l.* under s. 2, sub-s. 1 (*b*) of the Finance Act, 1894, and the trustees of the testator's will were accountable for that duty, or (in the alternative) that it might be determined to what extent and on what basis estate duty became payable on Mrs. Joshua's death in respect of the annuity of 5,000*l.* to which she was entitled for life, or in respect of the same annuity or another similar annuity to which her daughters became entitled on her death; (2.) if estate duty became payable by the trustees, whether it ought to be paid (i.) out of the testator's residuary estate as a whole or (ii.) out of that estate as a whole other than a slice to secure the said annuity of 600*l.* and any other subsisting annuities under the will or (iii.) out of the slice required to produce the annuity of 5,000*l.* or out of some and what other part of the residuary estate, and what was the proper incidence of that duty as between the persons beneficially interested in the testator's estate, including annuitants.

Wilfrid Hunt for the trustees. The contention that the annuity ceased on Mrs. Joshua's death is ill-founded. What happened was that it ceased to be payable to her and passed to her daughters. There are not two separate annuities, one ceasing on Mrs. Joshua's death and the other commencing after her death and being payable to her daughters. There is only one and, as it passes to the daughters on Mrs. Joshua's death, duty is payable, under s. 1 of the Finance Act, 1894 (1), only on the value of a continuing annuity for the lives of her daughters and the survivor of them, i.e., as a share of the whole annuity.

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(1) By s. 1 of the Finance Act, 1894: "In the case of every "person dying after the commencement of this Part of this "Act, there shall, save as hereinafter expressly provided, be "levied and paid, upon the principal value ascertained as hereinafter provided of all property, "real or personal, settled or not "settled, which passes on the "death of such person a duty, "called 'Estate duty,' at the "graduated rates hereinafter mentioned, and the existing duties "mentioned in the First Schedule "to this Act shall not be levied in "respect of property chargeable "with such estate duty."

By s. 2, sub-s. 1 (*b*): "Property "passing on the death of the "deceased shall be deemed to "include the property following, "that is to say:—. . . . "(*b*) Property in which the deceased or any other person had "an interest ceasing on the death of "the deceased, to the extent to "which a benefit accrues or arises "by the cesser of such interest ". . . ."

By s. 7, sub-s. 7: "The value of "the benefit accruing or arising "from the cesser of an interest "ceasing on the death of the "deceased shall—(*a*) if the interest "extended to the whole income "of the property, be the principal "value of that property; and (*b*) if "the interest extended to less than "the whole income of the "property, be the principal value "of an addition to the property "equal to the income to which "the interest extended."

By s. 8, sub-s. 4: "Where "property passes on the death of "the deceased, and his executor is "not accountable for the Estate "duty in respect of such property, "every person to whom any "property so passes for any beneficial interest in possession, and "also, to the extent of the property actually received or disposed of by him, every trustee, "guardian, committee, or other "person in whom any interest in "the property so passing or the "management thereof is at any "time vested, and every person in "whom the same is vested in "possession by alienation or other "derivative title shall be accountable for the Estate duty on the "property and shall, within the "time required by this Act or such "later time as the Commissioners "allow, deliver to the Commissioners and verify an account, "to the best of his knowledge and "belief, of the property: Provided "that nothing in this section contained shall render a person "accountable for duty who acts "merely as agent or bailiff for "another person in the management of property."

By s. 9, sub-s. 1: "A rateable "part of the Estate duty on an "estate, in proportion to the value "of any property which does not "pass to the executor as such, shall "be a first charge on the property "in respect of which duty is "leviable . . ."

By s. 14, sub-s. 1: "In the "case of property which does not "pass to the executor as such, an "amount equal to the proper "rateable part of the Estate duty "may be recovered by the person, "who being authorized or required to pay the Estate duty in "respect of any property has paid "such duty, from the person entitled to any sum charged on "such property, whether as capital "or as an annuity or otherwise, "under a disposition not containing any express provision to "the contrary."

J. H. Stamp for the Attorney-General. The annuity bequeathed to Mrs. Joshua is quite separate from that bequeathed to her daughters and, on her death, duty is payable on the capital value of the annuity bequeathed to her. By the cesser of her annuity on her death, a benefit accrued to her daughters in so far as their annuity then became payable. Thus, there passed on her death "property"—i.e., the residuary estate out of which her annuity had been paid—"in which the deceased . . . . had an interest ceasing on the "death of the deceased" within s. 2, sub-s. 1 (*b*) of the Finance Act, 1894. Mrs. Joshua's "interest," i.e., her annuity, ceased on her death and duty is, accordingly, payable on the capital value of her annuity.

Jennings K.C. and *Albery* for Mrs. Joshua's daughters adopted the last argument.

H. H. King for other annuitants.

Roxburgh K.C. and *Hewins* for residuary legatees. It is true that, on construction alone, there seem to be two annuities, one to Mrs. Joshua, the other to her two daughters. It is not, however, merely the form and strict wording of the disposition that has to be considered, but, rather, the effect of it. That is so because, in cases such as the present, it is not the practice of the Estate Duty Office to charge duty on the capital value of the annuity when the first annuitant dies, as it has been contended ought to be done in the present case. The Estate Duty Office treats the first annuity, or the interest of the first annuitant—i.e., in the present case, Mrs. Joshua's—as a single item of property which can pass under s. 1 of the Finance Act, 1894, and does not charge estate duty on the basis of capital value under s. 2, sub-s. 1 (*b*) until the death of the last surviving annuitant—i.e., in the present case, the survivor of the daughters. That practice is followed on the footing that what is bequeathed to Mrs. Joshua and her daughters is a single item of property which came into being as soon as Mrs. Joshua took, on the testator's death, that, on her death, her daughters will get a proportionate part of that item of property and that it will cease to exist only on the death of the survivor of the daughters. True it is that this view of the matter may stretch the bounds of definition: for, once several successive annuitants participate in an annuity, it must be the case that there are really several annuities in succession, and the only exception to that is where an annuity is given in perpetuity. As against that circumstance, however, the practice of the Estate Duty Office is very proper, because it postpones until the last annuitant has died the payment of duty on the basis of capital value, and the present case is pre-eminently one in which that practice ought to be followed.

Cur. adv. vult.

1945. Nov. 15. ROMER J., reading a judgment, said: As a question of construction solely and simply, it is, in my judgment, reasonably plain that the annuity of 5,000*l.* bequeathed to Mrs. Joshua's daughters after her death is not the same annuity as that bequeathed to Mrs. Joshua during her lifetime. It is a distinct and different annuity, although of the same amount. Preliminary to the annuities which he specifies, the testator himself draws attention to the fact that some of them are not immediate, but future. An examination of them then reveals that, whilst most of them are to take effect at the testator's death, others are to await the deaths of certain named persons. In the latter category are, first, the annuity to Mrs. Joshua's daughters, secondly, the annuity to the children of Admiral and Mrs. Seymour Brand, and, thirdly, the annuity to Mademoiselle Marie Guillaume. What the exact purpose was which the testator had in mind in giving one annuity of 5,000*l.* to Mrs. Joshua for her life and a separate annuity of the same amount to her daughters after her death instead of carrying the same annuity to successive interests, may be open to question, but in my opinion he could scarcely have effected the purpose by plainer language than that which he actually used.

On this view of the matter, Mr. Stamp, on behalf of the Attorney-General, says that the case falls precisely within the language of s. 2 (1.) (*b*) of the Finance Act, 1894. That provision is to the effect that property passing on the death of the deceased shall be deemed to include property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. Mrs. Joshua, says Mr. Stamp, had an annuity for 5,000*l.* (payable out of residue) which ceased upon her death, and duty is accordingly payable by reason of such cesser of interest.

Mr. Roxburgh, who argued the question on behalf of certain infant defendants who are interested in residue, was not disposed seriously to challenge that, as a mere question of construction, the annuity bequeathed to Mrs. Joshua's children is different from that bequeathed to Mrs. Joshua herself. He contends, however, that what one has to consider is the substance of the matter and that, for present purposes, the language in which the annuities were bequeathed is of little or no materiality. The foundation of Mr. Roxburgh's case is a practice which has grown up, and now apparently prevails, in the Estate Duty Office with regard to joint or successive interests in what I may describe as a single annuity. The practice may be illustrated in the following way: If an annuity of X*l.* a year is bequeathed to A for life, then to B for life, then to C for life, on the death of A (B and C surviving) estate duty is charged as on the passing of property (viz., a share of the annuity) and not as on the cesser of an interest. The same principle would be applied on the death of B, leaving C surviving, and estate duty would not be levied on a cesser of interest (that is to say, on a capital value basis) until the death of C. The same practice is adopted where joint beneficial interests are created in one annuity. Thus in a letter from the Estate Duty Office which is in evidence in the present case it is stated that, as the official practice now stands, the interests of Mrs. Joshua's two daughters, which arose on the death of their mother, would be treated as being in one annuity.

This practice evidently did not prevail at the time of *In re Palmer* (1) for, had it done so, duty would not have been charged on the death of Ronald Palmer on a cesser of interest basis so far as the 3,000*l.* annuity there under consideration was concerned. It may have sprung up as a result of some of the observations which fell from the Court of Appeal in that case. Be that as it may, Mr. Roxburgh relies on the fact that the practice does prevail now and says that, if it is to be applied on the death of one of several successive takers in a single annuity, there is no rational ground for not applying it to the position which arose on the death of Mrs. Joshua. He says that the idea underlying the practice is that an annuity given to successive takers is a single item of property which subsists over a period, namely, that period between its commencement and the death of the last taker, and that there is a passing of a proportionate part of this item of property upon the deaths of successive takers, with a cesser of interest on the death of the last. He questions whether this conception accords with strict legal theory, on the ground that every annuity (except a perpetual annuity) given to successive takers is in reality not one annuity but several successive annuities ; but he suggests that its adoption is justified as avoiding the hardship which the old practice would, and did, involve. Mr. Roxburgh then proceeds to the conclusion that this conception is and must be equally applicable to every case in which the substance of the matter is that an annual sum of the same amount is payable, without intermission, to successive takers, and that such is the substance of the matter in the present case.

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(1) [1916] 2 Ch. 391.

Inasmuch as the burden on the testator's estate does not differ in any respect from what it would have been had a so-called single annuity of 5,000*l.* a year been bequeathed to Mrs. Joshua for life and after her death to her two daughters, it certainly does seem to be a matter of some hardship that the estate should be saddled with a burden from which it would or might have been free had the provision for Mrs. Joshua and her daughters taken that form. Whether or not the present practice of the Estate Duty Office to which I have referred is legally correct or not, I do not propose to determine. Certain it is that it tends to avoid hardship and I should therefore be reluctant to cast doubts on its legitimacy in a case in which, as I see it, it is not necessary for my decision that I should express an opinion either way. But the conception of one single annuity with successive takers as a separate item of property, having a definite period of existence, and as such capable of passing under s. 1 of the Finance Act, 1894, which (whether right or wrong) seems to me to be quite an intelligible conception and which is the foundation of the principle, has, in my judgment, no application to a case in which the beneficiaries cannot in any sense be said to be successive takers in one item of property, but are separate proprietors of different and independent interests. It is true that the burden on the paying hand is the same in the one case as in the other. The difference, however, between the interests which are bequeathed to Mrs. Joshua and her daughters respectively is by no means merely a matter of form, but is a matter of real substance. Not only is the annuity bequeathed to the daughters not the same as the annuity bequeathed to their mother, but it is wholly apart from it and altogether independent of its fate. If investments had been appropriated to answer Mrs. Joshua's annuity, their depreciation or loss during her lifetime would have resulted in a disadvantage common to herself and her daughters, had the latter inherited in succession to their mother, but, having regard to the form in which the testator has bequeathed their beneficial interests, such loss or depreciation, had it occurred, would not have affected in the slightest degree the claim of her daughters to the payment of 5,000*l.* a year in full from the moment of their mother's death.

As, then, I find (*a*) that Mrs. Joshua was entitled to a life annuity of 5,000*l.* payable out of residue, (*b*) that that annuity has ceased to be payable by reason of her death, and (*c*) that a position has accordingly arisen which is precisely within the language of s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, I have no right to say that that provision does not apply merely because a disposition differently worded but identical in effect might have led to a different result. In my judgment, s. 2, sub-s. 1 (*b*) does apply and I will declare that the 5,000*l.* annuity to Mrs. Joshua ceased on her death and that duty became payable under s. 2, sub-s. 1 (*b*).

On February 25 the summons was again before the court, for argument on question 2.

Jennings K.C. and *Albery* for Mrs. Joshua's daughters. The duty ought to be paid either out of the residuary estate as a whole or—which would be more to the daughters' advantage—out of the residuary estate, but not so that any part of it falls on the investments. Either all the annuitants take advantage of the exclusion and bear no part of the duty, or else they all come in. [They referred to *In re Palmer* (1).] The present is not a case in which legacies are given and there is a residue left when the legacies have been paid. [They referred to Finance Act, 1894, s. 2 sub-s. 1 (*b*); s. 7, sub-s. 7; s. 8, sub-s. 4; s. 9, sub-s. 1 and s. 14, sub-s. 1.] If an annuity is charged on a fund as a whole, it must be for the benefit of the persons interested in that fund that the annuity should cease: but the distinction between the present case and *In re Palmer* (1) is that, in *In re Palmer* (1), the annuity was to be given out of the settled residue only. In the present case the annuities are payable out of the general estate and, until they have been provided for, a true residue does not exist, although it is quite possible to discover what its amount would be if it did exist. No provision has been made for the annuities, as there has

(1) [1916] 2 Ch. 391.

been no appropriation to them. Therefore, the daughters are not liable for any part of the duty becoming payable on Mrs. Joshua's death. If, however, that view is incorrect and they are so liable, then it must logically follow that there is no distinction to be made between any of the annuitants under the will and that, on the death of any annuitant, each of the surviving annuitants must bear a proportion of the duty which becomes payable.

Armitage for Mrs. Brand and her children. It is apparently suggested that, where a testator bequeaths several annuities and one annuitant dies, the surviving annuitants must bear a proportion of the estate duty on each death. That is a novel and startling proposition and is not supported by the text-books or the cases. In *In re Palmer* (1) the testator gave to his wife for life an annuity of 12,000*l.*, and gave to his trustees power to appropriate part of his estate to it: and he directed them to provide for the payment out of it, and to make various other payments out of his residuary estate, and to hold the residue of his estate, which he called the "settled residue," on trust to pay, inter alia, the 3,000*l.* annuity. Whether the trustees did or did not appropriate to the widow's 12,000*l.* annuity does not appear from the report: nor does it appear that it was contended that she ought to bear any part of the duty. The annuities in the present case, including the substituted annuities, are all in the same position as was the 12,000*l.* annuity in *In re Palmer* (1). In *Harbin* v. *Masterman* (2) the bequest of the annuity was made not, as in the present case, out of the general estate, but was contained in the gift of residue. That case, therefore, is not as strong as the present case, but it does show that an annuitant for whom ample provision has been made has no interest whatever in the true residue. The annuitants rank pari passu with the residuary legatees and as, in *In re Palmer* (1), the widow's 12,000*l.* annuity appears to have carried no liability whatever on her to bear part of the duty, so, here, the annuitants should not bear any part of it. No part of the sum which produced Mrs. Joshua's annuity passed to the daughters or to any other annuitants "for" a "beneficial interest in possession" within s. 8, sub-s. 4, of the Finance Act, 1894. It did, however, pass for such an interest to the residuary legatees; and, accordingly, it is they who must bear the duty.

H. H. King, for another annuitant, adopted the last

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(2) [1896] 1 Ch. 351.

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argument. In *In re Palmer* (1) the Court of Appeal purported to be applying the rule in *In re Parker-Jervis* (2) that, as it is stated in the headnote to that case, under the Finance Act, 1894, the estate duty on an estate passing on a death is chargeable on the estate as a whole, without regard to tenancies for life or other particular interests, the scheme of the Act being that the duty shall be levied on the inheritance and that the inheritance shall bear it. *In re Parker-Jervis* (2) dealt with a settlement. The principle which was applied in that case is not applicable to a case like the present.

Upjohn K.C. and *Hewins* for residuary legatees. All the annuitants, and not only the residuary legatees, must bear a proportion of the estate duty: see Finance Act, 1894, s. 14, sub-s. 1, and *In re Parker-Jervis* (2). The amount of estate duty payable is ascertained by taking into account the whole of the general estate, including that part of it which provides the annuities. That " whole " is the capital out of which the duty is paid, so that, in effect, the annuitants pay an amount of duty proportionate to their interest in the capital. The incidence of duties is primarily a question of construction of the will: and, unless the will directs that special provision be made in respect of future duties, duties arising on deaths after that of the testator are to be borne primarily by the fund on which the annuities are charged. In the present case the court is thrown back on the general law to see whether the annuitants are to bear all the duty or whether part of it is to be borne by residue. The personal liability of legatees to account for duty is prescribed by s. 8, sub-s. 4, of the Finance Act, 1894. It may be that the existing annuitants are not under any liability within that sub-section. That, however, is immaterial, because they come within s. 9, sub-s. 1, under which the liability for estate duty on Mrs. Joshua's death is cast on the whole of the testator's general estate: see *In re Palmer* (3). Thus, all who are interested in the general estate must make their contribution according to their interest: see s. 14, sub-s. 1. [They referred to *Berry* v. *Gaukroger* (4).] Mrs. Joshua's daughters must therefore contribute to the duty: *In re Palmer* (3). Alternatively, under s. 9, sub-s. 1, there is a charge on the whole fund and it is in accordance with the general principles of equity, as well as with s. 14, sub-s. 1, that everyone interested, including the annuitants, must bring in their proportion. [They referred to *In re Hicklin* (1).] When an annuitant dies, a benefit does accrue to surviving annuitants, in the sense that the security for their annuities is improved. In the present case there has been no appropriation to the annuities and the charge is, accordingly, on the whole of the estate. [They referred to *Skinner* v. *Attorney-General* (2).]

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(1) [1916] 2 Ch. 391.

(2) [1898] 2 Ch. 643.

(3) [1916] 2 Ch. 391, 392, 399.

(4) [1903] 2 Ch. 116.

Jennings K.C. in reply on the cases. Not in *Berry* v. *Gaukroger* (3), *In re Hicklin* (1), or *Skinner* v. *Attorney-General* (2) did the precise point arise which arises here. Those authorities could assist the residuary legatees only on the exact questions on which they were decided, which do not really touch this case.

Armitage in reply on the cases. *Berry* v. *Gaukroger* (3), *In re Hicklin* (1) and *In re Palmer* (4) have no bearing on the point here to be decided. In each of those cases there was a true residue and the decision was, in effect, merely that every person interested had to bear a due proportion of the duty. In *Skinner* v. *Attorney-General* (2) the decision was merely that an annuitant has an " interest " within the meaning of the Act in the whole general estate and that, of course, is undeniable. The point in the present case is that the interest of the successive annuitants, i.e., Mrs. Joshua's daughters, is not in the fund that produced Mrs. Joshua's annuity. That fund passed, not to them, but to the residuary legatees.

Cur. adv. vult.

March 15. ROMER J. Having sufficiently stated most of the relevant facts relating to this summons in the judgment which I delivered on question 1, I need not refer to them again. On this question I decided that upon the death of Mrs. Joshua, who had enjoyed an annuity of 5,000*l.* under the will of the testator during her life, estate duty became payable upon the capital value of the slice of the testator's estate required to produce an annuity of that amount under s. 2 (1.) (*b*) of the Finance Act, 1894. The question which I now have to determine is how the burden of the estate duty should be borne. Three alternative views seem possible and were argued before me. The first is that the testator's residuary estate should bear the whole burden of the duty, without any contribution being made from any other source. The second is that a rateable contribution to the burden should be made

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(1) [1917] 2 Ch. 278, 281.
(2) [1940] A. C. 350.
(3) [1903] 2 Ch. 116.
(4) [1916] 2 Ch. 391, 392, 399.

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at the expense of all the annuities presently payable and of the future annuities when they become payable; and the third is that some contribution should be made, but that it should be limited to the annuity which, by reason of Mrs. Joshua's death, has now become payable to her two daughters. The question which of these alternatives provides the true answer is partly one of authority, but principally one, I think, of construction, both of the testator's will and of the Finance Act, 1894.

[His Lordship read the residuary disposition contained in the will and read also the Finance Act, 1894, s. 2, sub-s. 1 (*b*); s. 7, sub-s. 7; s. 8, sub-s. 4; s. 9, sub-s. 1, and s. 14, sub-s. 1. His Lordship then continued:] In the present case, Mrs. Joshua had an " interest in " " property " which ceased on her death and duty became payable as on the passing of property, but only to the extent to which a benefit accrued or arose by reason of the cesser of her interest. A benefit did in fact accrue inasmuch as the burden of the annuity was removed from the testator's estate. As Mrs. Joshua's interest did not extend to the whole income of the estate, the value of the benefit so accruing is, in the words of s. 7, sub-s. 7 (*b*), to be taken as " the principal value of an addition to the " property equal to the income to which the interest extended." The obscurity of this provision has been commented on judicially more than once, but under it there has been adopted what is familiarly known as the " slice " principle, and, in accordance with it, duty has become payable in the present case on a slice of the estator's estate amounting to about 118,483*l*.

Mr. Upjohn, on behalf of those interested in residue, argued that by reason of s. 14, sub-s. 1, of the Finance Act, 1894, the annuitants must make a contribution to this burden on the lines laid down in *In re Parker-Jervis* (1). Alternatively, he contended that such a contribution ought to be exacted in accordance with ordinary principles of equity. As to this alternative contention, I am unable to see that any principle of equity requires that an annuitant, who acquires no benefit from the death of a fellow annuitant, should have to contribute towards the duties to which that death gives rise. It is said that the death of an annuitant enhances the security available to the surviving annuitants and that they obtain a benefit in that sense. Whilst that might be true in some cases and under some circumstances, the magnitude of the testator's

(1) [1898] 2 Ch. 643.

estate in the present case is such that I am unable to accord to this element any more than theoretical recognition. In my judgment, the contention of the residuary legatees in so far as it is based purely on the practice of equity, cannot be established and must succeed, if it is to succeed at all, on the joint effect of the relevant sections of the Finance Act, 1894, and the provisions of the testator's will. As to the latter, Mr. Upjohn says, and rightly, that if the Act requires contribution from the annuitants, there is nothing in the will to which they can point as freeing them from it, for the only duties which the testator has expressly thrown on residue, in exoneration of the annuitants, are those which should at his death be " ascertainable and payable " as distinct from those payable in future, such as the duty which is now in question.

There can be no doubt in general but that if a fund passes, or is deemed to pass, on a death but does not pass to the executor of the deceased as such, the duty which becomes leviable by reason of the death has to be borne rateably by those who succeed to the fund. " . . . . in respect of such " property," said Vaughan Williams L.J. in *Berry* v. *Gaukroger* (1), " the scheme of the Act is to tax, not the interest " which ceased with the death, but the property out of which " the interest was enjoyed." In cases where the fund passes for a beneficial interest in possession, those who succeed are subjected to a personal liability by s. 8, sub-s. 4, of the Act. In addition to this, however, the revenue is safeguarded by the charging provisions of s. 9, sub-s. 1. The effect of this latter sub-section is not, however, confined to creating a charge for the benefit of the revenue, but extends also to apportioning the burden of the duty rateably among those who succeed to the property (*Berry* v. *Gaukroger* (1); *In re Hicklin* (2)). Mr. Upjohn, whilst admitting that no property passed in the present case to the annuitants " for any beneficial interest in " possession " so as to attract the operation of s. 8, sub-s. 4, of the Act, argued that, nevertheless, a charge arises under s. 9, sub-s. 1. He did not contend that the duty is charged solely on the notional slice of the estate which forms the measure of the duty payable and that that slice has passed to Mrs. Joshua's children, for this view was not open to him, having regard to the decision of the Court of Appeal in *In re Palmer* (3)—a case to which I will refer again—but he

(1) [1903] 2 Ch. 116, 129.
(2) [1917] 2 Ch. 278.
(3) [1916] 2 Ch. 391.

contended that the charge extended to the whole of the general estate and should be borne rateably by all those (including the annuitants) who are beneficially interested in such estate. This, he said, is the result of s. 9, sub-s. 1, and s. 14, sub-s. 1, of the Act when applied to the circumstances of the present case. It seems to me that, in order for Mr. Upjohn's argument (persuasive though it was) to succeed, it is necessary for him to establish that the annuities are charged on the property which has benefited from the cesser of the annuity, that is to say, the fund into which the notional slice, by reason of such cesser, has fallen and of which it now forms part.

As to this, Mr. Upjohn pointed out that there has been no appropriation to answer the annuities from which he is seeking to levy contribution, which were and are accordingly payable out of the whole of the testator's general estate, and it is that estate which has benefited by the cesser of Mrs. Joshua's annuity. In that connexion he referred to the opinion of Lord Russell of Killowen in *Skinner* v. *Attorney-General* (1), in which his Lordship said that it appeared to him " beyond " question that an annuitant, whose annuity is payable out of " a testator's estate and who is therefore interested in the whole " estate, is necessarily also interested in all the parts which " compose the whole ; and that her right to take proceedings " (if necessary) to have the estate administered for the purpose " of providing her annuity, is merely the right of enforcing or " realizing that interest which she has in the whole and its " parts." This opinion was directed to answering the appellant's contention in that case, which was a revenue case, that the annuitant's right was limited to a right to have the estate administered and cannot, in my judgment, support the argument which Mr. Upjohn sought to base on it. The reason why I come to that conclusion is that, although undoubtedly annuitants such as those entitled under the testator's will have an interest in the whole of the estate, until an appropriation has been made to answer them, the argument leaves out of account the relative rights and positions of the annuitants on the one hand and the residuary legatees on the other. Those interested in residue can take nothing until the annuitants are paid or provided for in full. On the other hand, the annuitants, once paid or satisfied, have no further interest in the rest of the estate, however much it may subsequently be impoverished or enriched. In the present case no appropriation has ever been made in respect of the now subsisting annuities, and inasmuch as all of the shares in the testator's residuary estate are settled and the whole of such estate is accordingly retained by the trustees, no such appropriation was necessary. Had such an appropriation as that authorized by the will been in fact effected, the annuitants would have thenceforward become, for all practical purposes, isolated from residue and from those interested in residue; and in such case I can see no ground on which it could be suggested that the surviving annuitants could be rendered liable to make any contribution towards the duty which would become exigible on the death of one of their number. It would appear remarkable that the liability, or freedom from liability, of an annuitant should depend on a mere incident of administration, on whether the trustees do or do not think it right to make an appropriation, either under the general law (as to which see *Harbin* v. *Masterman* (1)) or under some express power contained in their testator's will. In my judgment, the question does not so depend. In the present case, where the value of the estate far exceeds the amount required to satisfy all the annuities, there is no difficulty in notionally doing what an appropriation would have done in fact, namely, dividing the estate into two proportionate parts, one representing that which is required to ensure payment of the annuities, and the other representing the testator's residuary estate. On the death of an annuitant an amount equal to the appropriate "slice" sinks from the first part into the second, and it is on that amount that duty is payable. If in such circumstances the Revenue acquires a charge, under s. 9, sub-s. 1 of the Finance Act, 1894, it is on that part of the estate (namely, residue) into which the slice falls, including the slice itself. No charge exists, in my judgment, on that proportion of the estate which is required to satisfy the annuities still outstanding. Similarly, and by parity of reasoning, the surviving annuitants are not persons who, within the purview of s. 14, sub-s. 1 of the Act, are entitled to any sum charged (whether as capital or as an annuity or otherwise) on property in respect of which duty has become payable or been paid. The property, the passing of which has given rise to a claim for duty, is in effect the notional slice required to produce the annuity which has determined; and, in my judgment, the other annuities cannot be regarded as charged on that slice either before or after its passing, or on the fund into which it falls.

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(1) [1940] A. C. 350, 358.

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(1) [1896] 1 Ch. 351.

I must consider more fully the case of *In re Palmer* (1), to which I have already referred. The headnote is: "Testator, "by his will made in 1910, bequeathed to trustees the sum of "25,000*l.* upon trust during the life of his wife to pay the "income to the person who would for the time being be "entitled as tenant for life or tenant in tail to the rents of his "settled hereditaments if his wife were then dead, and directed "that after the death of his wife the said sum should fall into "residue, and that all legacies thereinbefore given or which "might be given by any codicil should be handed over or paid "free of all duties and deductions in respect of duties (other "than income tax) to the several legatees; and the testator "thereby devised his settled hereditaments to his trustees "upon trusts in favour of his wife during her life, and after "her death to the use of his nephew A for life, with remainder "(in the events which happened) to his nephew B for life, "with remainder to the use of B's children in strict settlement; "and the testator thereby gave his residuary real and personal "estate to his trustees upon trust for sale and conversion, and "out of the moneys so to arise to pay his funeral and "testamentary expenses and legacies, and to make provision "for the payment of all duties on any bequests thereinbefore "made free from duties or deductions for duties, and to invest "the residue upon trust out of the income thereof to pay an "annual sum of 3,000*l.* to the person who would be so entitled "as tenant for life or in tail as aforesaid, and to hold the "surplus income upon the trusts therein mentioned. The "testator died in 1913. A died a bachelor in 1915. Upon "the question how as between the beneficiaries under the will "the estate duty payable on the death of A imposed since the "testator's death by virtue of the Finance Act, 1914, s. 14, "ought to be borne :—*Held,* (1.) reversing the decision of "Younger J. [1916] 1 Ch. 395, that the duty on the settled "legacy must be paid out of the investments representing "the 25,000*l.*, and not out of the residue; and (2.), varying "the order (as drawn up) of Younger J. that, inasmuch as "the annuity of 3,000*l.* was chargeable upon the whole estate, "the residue, the whole of which benefited by the cesser "of the annuity, must bear the duty, the annuitant being "liable, however, to pay interest on a rateable proportion

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(1) [1916] 2 Ch. 391.

" of the duty corresponding to the proportion which the " notional sum required to produce the annuity bore to the " whole residue."

In addition to the facts as so stated, the report discloses also that by cl. 12 of his will the testator bequeathed an annuity of 12,000*l.* to his wife (who was the plaintiff in the proceedings) during her life, with power for his trustees to appropriate part of his estate to provide for the payment thereof, and by cl. 22 (which was the residuary disposition) the testator directed his trustees to provide for the said annuity and to make sundry other payments out of his residuary estate and to hold the residue of such estate (which he described as the " settled " residue ") upon trust, inter alia, to pay the 3,000*l.* annuity mentioned in the headnote. For present purposes I need not concern myself with the question of the 25,000*l.* settled legacy, as the only relevant part of the decision is that which related to the 3,000*l.* annuity. Duty had been paid in respect of this annuity on the death of Ronald Poulton (described as " A " in the headnote), on the footing that there had been a cesser of interest, that is, it had been paid under s. 2 (1.) (*b*) of the Act of 1894, and the question argued before the Court of Appeal was whether Ronald's successor, who, on Ronald's death, came into possession of a new annuity of the same amount, was bound to pay the whole interest on the amount required for the duty, or whether the liability should be apportioned rateably between him and those interested in the settled residue, subject to the said annuity. It was not suggested that the annuitants should be wholly exempt from contributing to the duty. The notional " slice " of the testator's estate on which duty was paid amounted to 75,000*l.* This sum of 75,000*l.* was, said Lord Cozens-Hardy, M.R. (1) " a purely fictitious sum, or " a 'notional sum.' The annuity was chargeable upon the " whole residue, and not upon any particular 75,000*l.* No " charge can be given under s. 9 upon a non-existing fund. " It is the whole residue which has derived benefit from the " cessation of the annuity, and the burthen upon the income of " the residue must be apportioned on the footing of s. 14, or " in accordance with general principles which lead to the same " result. In my opinion there is no justification for throwing " the whole duty upon an imaginary 75,000*l.*, with the " consequence that the annuitant would have to pay the full " interest on the amount paid. The annuitant must bear his

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(1) [1916] 2 Ch. 391, 399.

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"rateable proportion only, in accordance with Mr. Justice "Kekewich's rule in *In re Parker-Jervis*" (1).

Pickford L.J. said (2): "The notional sum only comes into "existence to ascertain under s. 2, sub-s. 1 (*b*), and s. 7, "sub-s. 7 (*b*), the amount to which the estate has benefited by "the cesser of Ronald Poulton's annuity, and it has no "existence in fact as a separate fund, as is shown by its being "called a notional sum. It cannot, therefore, be correct, in "my opinion, as was argued by the respondents, that s. 9, "sub-s. 1, charges the duty upon this notional sum of 75,000*l.*, "with the result of making the annuitant bear the whole of "the interest upon the amount paid. Sec. 9 is for the "purpose of giving the Crown the benefit of a first charge upon "the property liable to pay the duty, and it cannot be applied "to give a charge only upon something which has no separate "existence at all. The annuity was charged upon the whole "estate, and the residue, the whole of which derives benefit "from its cesser, must pay the duty, and it will be apportioned "as described by the Master of the Rolls in accordance with "*In re Parker-Jervis*" (1).

So far as material, Neville J. expressed himself as follows (1): ". . . . we must consider both s. 2, sub-s. 1 (*b*), and s. 7, "sub-s. 7 (*b*), with the result, in my opinion, that the recipient "of the annual sum will have to pay interest upon such a sum "as represents the proportion borne by the notional sum of "75,000*l.* to the residuary estate of the testator. In my "opinion, s. 9, sub-s. 1, does not apply to the present case."

It seems to me that the principal element to be noted in that case, for present purposes, is that the "settled residue," out of which the 3,000*l.* annuity was payable, was a true residue; that is to say, the fund which remained after payment or due provision had been made out of the estate for all prior interests. The income of this residue, when so ascertained, was split up so that part of it became payable to the annuitant whilst the rest of it, together with the corpus, was to be dealt with for the benefit of other persons. In these circumstances, it is not surprising that no argument was addressed to the court with a view to exonerating the annuitant altogether. He was in effect a co-proprietor of the settled residue. Another point to be observed in the case is that apparently no suggestion was made that the testator's widow should make any contribution to the duty in respect of

(1) [1898] 2 Ch. 643.

(2) [1916] 2 Ch. 391, 402.

her 12,000*l*. annuity. I do not, however, stress this too much, because it is possible that the trustees had already made an appropriation to answer this annuity and thus segregated it for all purposes from the rest of the testator's estate.

In my judgment, the consideration which mainly distinguishes *In re Palmer* (1) from the case before me is that in *In re Palmer* (1) the new 3,000*l*. annuity was payable solely out of the fund which benefited by the cesser of the old annuity, namely, the " settled residue." That is not, in my opinion, the position here. The property which was deemed to pass on Mrs. Joshua's death was the notional sum which had produced her annuity. It cannot be, and was not suggested, that that sum, or any part of it, passed to the other annuitants " for any " beneficial interest in possession " under s. 8, sub-s. 4, of the Act. On the other hand, it did so pass, in my judgment, to the residuary legatees; it sank into and formed thenceforward a party of the property settled on them. On this view of the matter and apart from s. 14, sub-s. 1, no argument can be founded, adverse to the annuitants, on the charging provisions of s. 9, sub-s. 1. Can it be truly said, then, that the annuities are charged on the residuary estate so as to bring the provisions of s. 14, sub-s. 1, into play? The answer, I think, for the reasons which I have previously indicated, is No. The annuities are charged on the general estate and there can be no residue until they have been provided for in full. As I have already said, the point could, I think, scarcely have been argued had an appropriation been made to answer the annuities and had a true residue thus been established; and the omission—I use the word in no derogatory sense—of the trustees to effect an appropriation in no sense prevents the recognition of an ascertainable annuity fund and an ascertainable residue.

In my judgment, accordingly, the annuitants cannot be called upon to make any contribution towards the duty in question; and in using the phrase " the annuitants " I intend to include Mrs. Joshua's children. As previously indicated, it was argued alternatively on behalf of the residuary beneficiaries that these children at all events ought to contribute, in the same way that the successor to Ronald Poulton had to contribute in *In re Palmer* (2). In my opinion, however, this is not so. The annuity bequeathed to Mrs. Joshua's children is no more payable out of residue than was Mrs. Joshua's own annuity. Their annuity, like hers, is payable out of the general estate and no residue can be said to exist until it has been provided for. So far as incidence of duty is concerned I cannot, I think, logically exempt the other annuities from contribution without exonerating this annuity as well.

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(1) [1916] 2 Ch. 391, 402.

(2) Ibid. 391.

I would add, in conclusion, on the main question, that, had I felt myself constrained to adopt a view different from that which I have expressed, I should have done so with some regret. So far as I am aware, it has never been the practice to charge an annuitant with any part of the duty which becomes exigible by reason of the death of a fellow annuitant in such circumstances as exist in the present case. Were such a practice to become established, it is easy to imagine cases where great hardship might arise; for example, where a testator leaves as many perhaps as thirty or more annuities. In such cases, by the time the surviving annuitant had outlived all his fellows, there would be little left of his annuity, although he had never benefited to the smallest degree by the deaths of all or any of them. It is obvious, of course, that different considerations might arise in cases where, for example, funds set free by the death of an annuitant thenceforward enable the other annuities, previously abated, to be paid in full; but, beyond noting such difference, I need not enlarge on it further.

I will accordingly declare that the estate duty which became payable in respect of the cesser of Mrs. Joshua's annuity ought to be paid out of the testator's estate, other than such part thereof as is required to secure the other subsisting annuities, including the 5,000*l.* annuity which is now payable to Mrs. Joshua's daughters.

The costs of all parties as between solicitor and client will be paid out of the estate.

Solicitors: *Norton, Rose, Greenwell & Co.; Solicitor of Inland Revenue; Lewis & Lewis and Gisborne & Co.; Cooper, Blake, Fettes, Roche & Wade; Vertue, Son & Churcher.*

K. R. A. H.

In re PARRY: BROWN *v.* PARRY.

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June 19, 21; *July* 19.

Administration—Will—Settlement of residuary estate on trust for sale—Absolute discretion in trustees to postpone conversion—Unauthorized securities—Application of rule in Howe *v.* Lord Dartmouth—*—Date of valuation, whether testator's death or one year later—Rate of interest payable to tenant for life.*

A testator who died in 1936 leaving a large estate much of which was invested in securities not authorized by the investment clause of his will, gave his residue on trust for sale and conversion, but with the fullest discretion to postpone conversion for as long as should be thought fit, and after directing the payment of an annuity to his wife, settled the trust funds on two tenants for life in succession, with remainders over:—

Held, (1.) that the rule in *Howe* v. *Lord Dartmouth* (1802) 7 Ves. 137, must be applied in the administration of the estate; (2.) that, having regard to the power to postpone conversion the proper date for the valuation in accordance with that rule of the unauthorized securities was that of the death of the testator, and (3.) the rate of annual interest on the capital value of such securities payable to the tenant for life was four per cent.

The expiration of one year from the testator's death is the proper date for valuation in cases where the testator has directed conversion without any power of postponement.

In re Fawcett [1940] Ch. 402 distinguished.

Brown v. *Gellatly* (1867) L. R. 2 Ch. 751, and *In re Woods* [1904] 2 Ch. 4, followed and applied.

In re Lynch Blosse [1899] W. N. 27, disapproved.

ADJOURNED SUMMONS.

By his will, dated November 7, 1935, the testator, after appointing executors and making certain specific and pecuniary devises and bequests, gave, devised and bequeathed all the residue and remainder of his real and personal estate to his trustees upon trust that they should out of his estate and the income thereof make a certain provision for the benefit of his wife and subject thereto upon trust to sell and convert into money such part of his estate not thereby otherwise disposed of as did not consist of money with full absolute and uncontrollable discretion in his trustees to postpone the sale and conversion of the whole or any part of his estate so long as they should think fit, wise and proper, and to stand possessed of the proceeds of sale thereof and of his ready money (thereinafter called his "residuary trust funds") upon trust to invest the same or any part thereof as therein mentioned and out of the income of his residuary trust funds to pay his wife an annuity of 2,000*l*.

per annum free of income tax and sur-tax (reducible to 1,000*l.* per annum tax free on re-marriage), and in the next place to pay certain small annuities and subject thereto to pay the remaining income of his residuary trust funds to his nephew, the defendant Thomas Sydney Parry, during his life and, on his decease, to pay the income of the said funds to the latter's son, the defendant Owen Sydney Parry, during his life and on his death in trust absolutely both as to capital and income in equal shares for the sons of the said Owen Sydney Parry (subject however to restrictions of a religious character), and if there should be only one such son the whole to be in trust for such one son. The testator died on September 3, 1936, and his will was duly proved by the executors therein named on October 23, 1936. The testator's widow was still living and was a lady of some eighty years of age. The defendant Owen Sydney Parry had one child only, namely, the infant defendant, Richard Owen Parry.

The whole of the testator's debts, the legacies bequeathed by his will, and his funeral and testamentary expenses had been discharged. The testator's estate was a large one and it included many investments which were of a non-trustee character and not authorized by the investment clause in his will. Some of the unauthorized investments were realized by the executors during the first year after the testator's death, some were realized subsequently, whilst others were still retained by the trustees in exercise of their power to postpone conversion. The unauthorized investments did not include any wasting assets such as leaseholds. The unauthorized investments greatly increased in value during the year immediately following the testator's death.

The questions raised by the summons were (*a*) whether the rule in *Howe* v. *Lord Dartmouth* (1) ought to be applied to the administration of the estate; (*b*) if so, whether the proper date of valuation of unauthorized securities was as at the death of the testator, or in the case of those retained for over a year, the expiration of one year from his death; (*c*) whether the tenant for life was entitled to interest at the rate of 4 per cent. per annum on the capital value so ascertained or at some other and what rate; (*d*) whether the principles laid down in *In re Fawcett* (2) applied to the case.

Wilfrid Hunt for the plaintiffs.

Raymond Jennings K.C. and *Droop* for the tenant for life.

(1) (1802) 7 Ves. 137.

(2) [1940] Ch. 402.

It is convenient to consider the date of valuation rather than the rate of interest. The question which arises here is one of principle. It has never been argued before, because it has never really mattered much whether the valuation is as from the death or from some date near to the death, and in the present state of the authorities the text-books are entirely at sea. The greater number take the view that where there is a trust for sale the securities should be valued at the end of one year from the death, and give the tenant for life 4 per cent. on that value, but where there is no trust for sale they should be valued as at the death, and the tenant for life given 4 per cent. on that value. Jarman on Wills takes the view that the valuation should be as at one year from the death in both cases. That was the position when Farwell J. considered *In re Fawcett* (1). In that case there was a trust for sale but no power to postpone and the court held that the date of valuation was the end of one year from the testator's death. The rule in *Howe* v. *Lord Dartmouth* (2) is to value at the end of one year. The present case is not covered by *In re Fawcett* (1) because there is a power to postpone conversion. We submit that the proper date of valuation in the case of unauthorized securities is one year from the death; that would certainly give a logical working rule. It cannot be the date of the death because however expeditious executors may be, they cannot sell as at that date. The underlying rule is that where a testator gives interests in succession, the first tenant for life is not to receive the whole actual income, and therefore the court treats the fund as having been converted and gives the tenant for life the income he would have received if it had been converted. The principle is now well settled that the funds are treated as converted at a date when the executors might reasonably have converted them.

The present state of the authorities is this: in *Howe* v. *Lord Dartmouth* (2) there was no trust for sale and the court held that there must be a notional conversion. *Dimes* v. *Scott* (3) was the converse case where there was a trust for sale, and no distinction as to the date of valuation where there was a trust for sale was suggested. Lord Lyndhurst held that the proper course was to treat the estate as converted at the end of one year. In all the following cases down to *Brown* v. *Gellatly* (4) the court always took the date as the end of one year from the death. That case covered three different kinds of property

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(1) [1940] Ch. 402.
(2) 7 Ves. 137.
(3) (1828) 4 Russ. 195.
(4) (1867) L. R. 2 Ch. 751.

(1.) . . . ships, (2.) . . . unauthorized securities, and (3.) . . . authorized securities. There was no trust for sale, only a power of sale, and the judge held that the ships must be treated as converted at the date of the death and the unauthorized securities at one year from the death. He gave no reason why the ships should be sold at the death. Kekewich J. decided *In re Woods* (1) and followed *Brown* v. *Gellatly* (2). It is submitted that *In re Woods* (1) was wrongly decided. Then came two or three cases down to 1920 where that was taken as a rule, but there was still no settled principle. In 1918, Eve J. had a case where there was a trust for sale and no power to postpone; and he still took the date of the death. There was nothing reported between 1920 and 1940, at which date the authorities end with *In re Fawcett* (3). [The following cases were also referred to: *Taylor* v. *Clark* (4); *Morgan* v. *Morgan* (5); *Yates* v. *Yates* (6); *In re Llewellyn's Trust* (7); *Meyer* v. *Simonsen* (8); *Gibson* v. *Bott* (9); *Caldecott* v. *Caldecott* (10); *In re Lynch Blosse* (11).]

Jenkins K.C. and *Rink.* Both in true *Howe* v. *Lord Dartmouth* (12) cases and in cases where there is an express trust for sale the court has in general treated investments as converted at the end of a year from the death. The principle is that equity looks on that as done which ought to have been done and the court imputes a duty to convert at the end of a year at latest and acts on that basis even where conversion is impossible in practice. Where, however, there is a trust for sale with power to postpone sale and the tenant for life is given only the income of the proceeds, there is no question of conversion at a particular time. In such cases the court does not adjust the rights of the parties on the basis of a notional conversion (such conversion having originally been into consols) but it has always set a value on the property and given interest on that value. The date for the valuation must be the date of the death; no other date is possible as the court cannot say that conversion ought to have taken place at any particular time. If it took place at one year from the death, it would be fixing that period for the execution of the trust for sale notwithstanding the discretion to postpone.

(1) [1904] 2 Ch. 4.
(2) L. R. 2 Ch. 761.
(3) [1940] Ch. 402.
(4) (1841) 1 Ha. 161.
(5) (1851) 14 Beav. 72.
(6) (1860) 28 Beav. 637.
(7) (1861) 29 Beav. 171.
(8) (1852) 5 De G. & Sm. 723.
(9) (1802) 7 Ves. 89.
(10) (1842) 1 Y. & C. C. C. 312.
(11) [1899] W. N. 27.
(12) 7 Ves. 137.

The distinction between cases where there was a duty to sell as soon as reasonably practicable (in which case there was conversion at the end of a year from the death) and cases where property was properly retained for the benefit of the estate (in which case there was a valuation as at the date of the death), was first recognized in *Gibson* v. *Bott* (1), decided three days before *Howe* v. *Lord Dartmouth* (2) see form of order in *Gibson* v. *Bott* (1) set out in *Caldecott* v. *Caldecott* (3). In *Brown* v. *Gellatly* (4) Lord Cairns L.C., had to deal with two kinds of property—one where there was, and one where there was not, a power to postpone and he adopted the date of the death and a year from the death in the respective cases. Since then the date of the death has been adopted in all cases where there has been a trust for sale with power to postpone sale: *In re Woods* (5); *In re Chaytor* (6); *In re Owen* (7); *In re Beech* (8); *In re Baker* (9), except in the very inadequately reported case of *In re Lynch Blosse* (10). In *In re Fawcett* (11), Farwell J. expressly stated in two passages that he was not laying down any rule for cases where there was a power to postpone sale. The text-book writers draw a distinction, which will not bear examination, between true *Howe* v. *Lord Dartmouth* cases and cases where there is an express trust for sale.

Jennings K.C. in reply referred to *Rowlls* v. *Bebb* (12).

[ROMER J. Apart from the question of date of valuation and rate of interest is it agreed that the principles of *In re Fawcett* (11) apply as asked in question 2 (*d*)?]

Jenkins K.C. Yes, in this court, but I must keep open for the Court of Appeal the question whether the tenant for life is entitled to receive interest at the appropriate rate out of capital, if necessary.

[Question 2 (*c*) was then argued (whether the rate of interest ought still to be 4 per cent.).]

Jennings K.C. The rate of interest must be fixed as at the date of the death and cannot be altered ex post facto. The evidence shows that the present low rates of interest are artificial and not likely to continue and 4 per cent. ought to

(1) 7 Ves. 89.
(2) 7 Ves. 137.
(3) 1 Y. & C. C. C. 312-3.
(4) L. R. 2 Ch. 751.
(5) [1904] 2 Ch. 4.
(6) [1905] 1 Ch. 233.
(7) [1912] 1 Ch. 519.
(8) [1920] 1 Ch. 40.
(9) [1924] 2 Ch. 271.
(10) [1899] W. N. 279.
(11) [1940] Ch. 402.
(12) [1900] 2 Ch. 107.

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remain. In the recent case of *In re Fawcett* (1), Farwell J. adhered to 4 per cent.

Jenkins K.C. In *In re Lynch-Blosse* (2) the judge gave one rate of interest for the period before the order and another rate after that date.

At the testator's death the rate of interest obtainable on a maximum portfolio of trustee investments was 3*l.* 12*s.* The court can consider subsequent rates of interest as showing that the low rates obtainable at the death have since been maintained and so are unlikely to alter. We suggest that 3½ per cent. would now be a fair rate, especially as the court ought to be conservative if the tenant for life's income is guaranteed, as decided in *In re Fawcett* (1). He referred to *In re Goodenough* (3); *Rowlls* v. *Bebb* (4); *In re Chaytor* (5); and *In re Beech* (6).

Cur. adv. vult.

July 19. ROMER J. having stated the facts, proceeded: In these circumstances, the first question raised by the present summons is whether the whole of the actual net income of the testator's residuary personal estate ought to be treated as income as between the persons interested in the income and the capital respectively of such estate or whether the rule in *Howe* v. *Lord Dartmouth* (7) or the corresponding rule applicable where there is a trust for sale, ought to be applied. As to this, Mr. Jennings and Mr. Droop, who appeared on behalf of the first two defendants, admitted that, in view of authority which is binding on a court of first instance, they were unable to argue before me that the rule did not apply to the present case. They reserved, however, the right to contend before a higher tribunal that the rule has no application, and ought not to have been applied in the past to cases such as the present where a testamentary trust for sale is coupled with a power, exercisable in the discretion of the trustees, to postpone conversion for an indefinite period.

I approach then the second question raised by the summons on the footing that the rule in *Howe* v. *Lord Dartmouth* (7) does in principle regulate the rights of tenant for life and

(1) [1899] W. N. 27.

(2) [1940] Ch. 402.

(3) [1900] 2 Ch 107.

(4) [1895] 2 Ch. 537, 65 L. J. (Ch.) 71.

(5) [1905] 1 Ch. 233.

(6) [1920] 1 Ch. 40.

(7) 7 Vesey. 137.

remainderman in relation to the income of the testator's residuary personal estate. On this assumption, the point which was first argued under question 2 of the summons was whether the value of the unauthorized investments should be based on their respective values as at the testator's death ; or, in the case of those still retained at the expiration of a year after the death, the values as at that date ; or, in the case of those realized during the said year, the net proceeds of realization thereof ; or on some and what other basis of valuation or values. The importance of these questions to the parties in the present case arises out of the fact, proved in evidence, that the unauthorized investments greatly increased in value during the first year after the testator's death.

" The rule in *Howe* v. *Lord Dartmouth* (1)," said Farwell L.J. in *In re Wareham* (2) " was laid down to give effect to the true " intention of testators in cases where there was a gift to one " or more tenants for life with remainders over. Lord Cottenham " in *Pickering* v. *Pickering* (3) shows that it is not a mere " artificial rule, but a beneficial rule for effectuating the inten- " tion of testators : How is the apparent intention to be " ascertained if the testator has given no particular directions ? " If, although he has given no directions at all, yet he has " carved out parts of the property to be enjoyed in strict " settlement by certain persons, it is evident that the property " must be put in such a state as will allow of its being so enjoyed. " That cannot be, unless it is taken out of a temporary fund and " put into a permanent fund." The rule, however, is not confined to the mere settlement of residuary personalty, but was applied at an early stage to cases where the settlement was operated through the medium of an express trust for sale. The will now under consideration contains such an express trust, but it is qualified by an ample discretion, vested in the trustees by the testator, to postpone conversion. There have been at least five cases of this character reported during the present century, and it would, I think, be convenient to refer to them at once.

In *In re Woods* (4) the testator's residuary personal estate, which he settled by way of successive interests, included certain shares in another estate which comprised mining property, and this property was under lease to lessees who worked the coal and minerals and paid rents and royalties. The trustees of the testator's will, in the exercise of the discretion conferred on them refrained from converting their interests in this mining property and retained the same as an investment and they received periodically from the trustees of the other estate sums of money as the share of the testator's estate in the mining rents and royalties. It was held by Kekewich J. that the tenant for life was entitled to 3 per cent. interest on the value of the rents and royalties, such value (and this is the important point for present purposes) being taken as at the testator's death. In the course of his judgment the learned judge said: "It has been decided "in *Brown* v. *Gellatly* (1) and in other cases that the proper "thing to do in a case of this kind is to value the securities "as at the time when they ought to have been converted— "that is to say, directly after the testator's death, if he has so "directed, or at the expiration of a year from his death if he "has given no direction, and, taking the value at that time, to "give the tenant for life interest on that value in lieu of profits "or royalties, so that he may have such a proportion as is "equivalent to the value of his interest."

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(1) 7 Ves. 137.
(2) [1912] 2 Ch. 312, 316.
(3) (1839) 4 My. & Cr. 289, 298.
(4) [1904] 2 Ch. 4.

In *In re Chaytor* (2) the estate which was settled included assets which were not of a wasting character but which were not authorized by the investment clause in the will. There was no express gift of the income pending conversion. Warrington J., after asking himself what is the general principle which is applied in cases where there is an express trust for conversion and a power to retain securities of every kind, authorized and unauthorized, and where there is no express gift of the income pending conversion, said: "As I understand it, the general rule "is that the tenant for life is entitled to the income of "authorized securities, but not entitled to the income of "unauthorized securities. In the latter case he is only entitled "to interest, which is now fixed at 3 per cent., on their value "at the testator's death." Then, after referring to a decision of Kekewich J. in *In re Thomas* (3) and to *In re Woods* (4), the learned judge continued: "In order that the tenant for life "should not lose income altogether the court steps in and says "for the proper administration of the estate the value of these "investments at the testator's death shall be taken as the "value of the proceeds of sale. As these unauthorized securities "cannot be kept as part of the estate, the tenant for life gets "the income of them as nominally converted at the testator's

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(1) L. R. 2 Ch. 751.

(2) [1905] 1 Ch. 233, 238.

(3) [1891] 3 Ch. 482, 486.

(4) [1904] 2 Ch. 4.

"death. That appears to be the rule laid down with the "object of preventing the discretion of the trustees from "operating to the prejudice of the tenant for life or the "remainderman."

In *In re Owen* (1) Neville J. expressed himself as follows: "The question depends upon the conventional rule which has "been adopted by the court in cases where a testator has "disposed of his property to trustees upon trust for sale with a "discretionary power to postpone the conversion of all or any "part of the estate, and has given his property to a tenant for "life with remainder over, but has not provided that until sale "the tenant for life shall have the benefit of the actual income "produced by the unauthorized securities. The court in such "a case has adopted a rule of taking the estimated capital "value of the unauthorized securities at the death of the "testator and allowing to the tenant for life 4 per cent. interest "upon the estimated amount and directing that in regard to the "surplus income arising out of the unauthorized investments "there should be accumulation and capitalization of that income." That principle had, in fact, been applied by an order made in earlier proceedings, and which is referred to on p. 521 of the report, and the summons before Neville J. was issued for the purpose of obtaining further directions in relation to that order. In *In re Beech* (2) Eve J. quoted the rule as stated above by Neville J. in *In re Owen* (1) and applied it to the case before him. Russell J. (as he then was) in *In re Baker* (3), stated that where part of a residuary estate, held upon trust for conversion with a discretionary power of postponement, consisted of an investment in an unauthorized security, the court had been in the habit of allowing the tenant for life a percentage on the capital value, ascertained at the testator's death, of the unauthorized investment. Finally, in *In re Fawcett* (4) the late Farwell J., in giving elaborate administrative directions which included a valuation of retained unauthorized investments at the end of one year from the death of the testatrix, twice pointed out that the trust for sale in that case was not qualified by any power to postpone and intimated that in cases where there was such a power different considerations might arise.

Having regard to the above decisions, it would appear at first sight that the rule or principle which was applied by each

(1) [1912] 1 Ch. 519.
(2) [1920] 1 Ch. 40.
(3) [1924] 2 Ch. 271.
(4) [1940] Ch. 402.

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of them should equally be applied, and in its entirety, to the case which is now before me; saving only, it is said, the question as to the rate of interest, to which I will refer hereafter. Mr. Jennings and Mr. Droop, however, on behalf of the first two defendants, object to that part of the rule which fixes the date of the death as the appropriate time for valuing the unauthorized investments. The proper time for valuing the investments which were retained unsold, they say, was the first anniversary of the testator's death. Their argument is that from the first appearance of the rule which is now usually referred to as the rule in *Howe* v. *Lord Dartmouth* (1), and the companion rule referable to trusts for sale, nobody ever thought of the testator's death as being the proper time for valuing unauthorized investments until it occurred to Lord Cairns L.C. to do so in 1867 in *Brown* v. *Gellatly* (2), and that confusion was thereby introduced into what had become settled practice. Apart from this, they say that Kekewich J. took the wrong turning in *In re Woods* (3), and that this deviation resulted in the judges who decided the subsequent cases being led astray. The point was not, it is contended, precisely argued in any of those cases, and, as they have given rise to an anomaly, they should not, so far as the point now in issue is concerned, be allowed to prevail. I propose accordingly to consider as briefly as possible the earlier history of the matter with a view to discovering whether the modern practice of valuing unauthorized investments at the testator's death, in cases where there is a trust for sale with power to postpone conversion, is really at variance with anything that was formerly established and whether it can fairly be said that such practice grew up, as it were, per incuriam.

The rule in *Howe* v. *Lord Dartmouth* (1) was not brought into being for the first time in that case nor was it then given its complete and ultimate form. The courts were for a long time troubled with the problem of doing justice as between tenant for life and remainderman where a testator gave residuary personalty to successive takers and where such residue included assets of a wasting or hazardous character. In cases where, on construction, the beneficiaries were intended to enjoy the assets in specie, either permanently or for a time, no difficulty arose. The difficulty presented itself where such an intention was absent. In cases where there was a trust for

(1) 7 Ves. 137.
(2) L. R. 2 Ch. 751.
(3) [1904] 2 Ch. 4.

sale, testators frequently made the problem all the more troublesome by using language which, on a strict reading, gave the life tenant nothing until conversion and re-investment had been effected. A further problem which received much and rather varied treatment was what (if anything) the tenant for life should receive during the first year after the testator's death. In 1841 (as appears from *Taylor* v. *Clark* (1)) it was still possible for a tenant for life in cases where there was a trust for conversion of residue, followed by a settlement of the proceeds, to present a threefold argument and to cite high authority in support of each contention. One was that he was entitled to the income of the residue during the first year after the testator's death, without reference to the investment in which he found it. An alternative argument was that he was entitled to the income accruing during the first year after the testator's death on such parts of the testator's estate as were invested at his death upon authorized investments and on such parts as were afterwards so invested during the same year, but not to the income of property not so invested. A third alternative was that he was entitled during that year to a notional income consisting of the dividends on so much 3 per cent. stock as would have been produced during the year by the conversion of the property at the end of the year. Of these alternatives, the third had been adopted by Lord Lyndhurst in *Dimes* v. *Scott* (2), and this was the one which, after (apparently) considerable doubt, Wigram V.C. applied in *Taylor* v. *Clark* (1). The Vice-Chancellor rejected the remainderman's contention (which would probably have prevailed some years earlier) that no income at all was payable to the tenant for life during the first year. *Dimes* v. *Scott* (2) was followed also on many subsequent occasions and it would seem that that case is the true parent of the rule, now well established, that where residue is subjected to a trust for conversion (whether express or implied) and there is a settlement of the proceeds, the right of the life tenant is to have the retained, but unauthorized, investments valued as at a year from the death and to receive interest from the death on such value. In *Morgan* v. *Morgan* (3) it seems to have been contended on behalf of the life tenant that the rule in *Howe* v. *Lord Dartmouth* (4) did not apply at all—principally (although small indications of intention were also relied upon) on the ground that the will there in question con-

(1) 1 Ha. 161.
(2) 4 Russ. 195.
(3) 14 Beav. 72.
(4) 7 Ves. 137.

tained no trust for sale. This contention failed, the Master of the Rolls observing that the rule was unquestionably the law and could only be displaced by language showing a contrary intention on the part of the testator. In applying the rule he also adjusted the rights of tenant for life and remainderman in accordance with the principle enunciated in *Dimes* v. *Scott* (1). Mr. Jennings is, therefore, I think, right in saying that by the time Lord Cairns decided *Brown* v. *Gellatly* (2), the general practice was—both in cases where there was and in cases where there was not a trust for conversion—to treat retained investments of an unauthorized character as converted at the expiration of a year from the testator's death, and to give the life tenant interest on the notional proceeds of such conversion starting from the date of the testator's decease. That being so, it is relevant to inquire why this point of time was chosen rather than the date of the death or some other time.

The first case to which I need refer on that point is *Sitwell* v. *Bernard* (3). In that case the testator directed that his residuary personal estate should " with all convenient speed " be laid out in the purchase of land and that the interest of such residuary personal estate should accumulate and be laid out in lands to be settled in like manner as he had directed the residue of his personal estate. The testator then directed the limitations of the estates so to be purchased, which were (in effect) limitations in strict settlement in favour of his sons successively and their issue. Delay occurred after the testator's death in the calling in and conversion of the personalty. Proceedings were instituted by the first tenant for life under the limitations declared by the will of the estates directed to be purchased and one of the questions raised was as to the plaintiff's right to interest on the unconverted personal estate. The case came before Lord Eldon in 1801 which was some years before it became finally recognized that life tenants in the position of the plaintiff in that case were entitled at all events to some interest from the date of the testator's death. Indeed, no such claim seems to have been advanced or argued for the plaintiff, Mr. Romilly's contention on his behalf being that he was entitled to the interest of the personal estate from the end of a year after the testator's death, whilst the remaindermen, founding themselves largely on the direction in the will for accumulation of interest, argued that until the residuary personalty was laid out in land, no person was to have any usufruct. Lord Eldon decided in favour of the plaintiff. In the course of his judgment he referred to the fact that two alternative views had been judicially expressed in cases comparable to that which was before him. "Lord Rosslyn," he said, "seemed to think there is a principle in the justice of the "court requiring him to consider that as done when it was "ordered to be done; differing from Lord Thurlow, who con-"sidered it as ordered to be done from the death of the testator, "Lord Rosslyn considering it as done from the date of the "decree, procured by the providence of the party himself. "From these decisions, therefore, it is uncertain what is the "true period in the case of a person having discretion enough to "file a bill, and the case of an infant: whether the death of the "testator, or the decree, if a suit was instituted: or, whether "the court would say that was a convenient period for this "purpose which for other purposes is determined to be con-"venient; though it does not often hit the real justice of the "case, viz., a year from the death of the testator." Later he said: "Where an estate is given in various legacies, and the "residue is given, it is a rule of convenience that authorizes "this court to say, for there is no language in the will for it, "that those legacies shall be payable at the end of a year from "the death of the testator; because as a general rule it may be "taken, that the personal estate may be collected within a "year; though in many instances that falls enormously to the "prejudice of the residuary legatee. The same convenience "has made the court say, the residuary legatee shall not claim "till the end of the year." After stating that the plaintiff could take nothing for the first year, the Lord Chancellor expressed his conclusions on the question whether the plaintiff should be kept waiting beyond the year in the following passages (1): "The court is therefore driven either to take the "end of the year upon the principle of general convenience, or "to examine in each particular case, what convenient speed and "reasonable diligence would have done: what negligence or the "law of the country or other circumstances have prevented; "and make those inquiries at the hazard of obtaining no clear "result. I am therefore disposed to say, justice requires, that "the plaintiff should have the interest from the end of the year ". . . . I am justified upon the whole, though I have had great "difficulty upon it, in saying the construction ought to be

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(1) 4 Russ. 195.
(2) L. R. 2 Ch. 751.
(3) (1801) 6 Ves. 520.

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(1) 6 Ves. 542, 543.

"that which will give the tenant for life the interest from the "period, at which in the contemplation of this court the residue "would be formed as residue, viz., the end of the year, con- "ceiving it hard upon him to take the time of the decree: "recollecting, that the former decree directs an inquiry, as to "what had been done without directing the money to be "called in; which certainly it ought upon that principle."

In *Gibson* v. *Bott* (1) there was a general residuary bequest, including a leasehold farm, with the stock, to be converted into money as soon as conveniently might be and the proceeds were settled. The executors managed the farm for some months after the testator's death and then sold it, together with the stock, which had substantially increased in value. Certain other leaseholds, which formed part of the testator's estate, could not be sold because of defects in title. Questions arose as to the respective rights of tenant for life and remaindermen both in relation to the farm and stock and in relation to the leaseholds remaining unconverted. As to the former, Lord Eldon in the course of an interim judgment followed his previous decision in *Sitwell* v. *Bernard* (2) and pointed out the disadvantage attending any departure from the general rule which he had there applied. "The point," he added, "is what is "advantageous, not to the sole owner of the property, but to "all persons interested, and as to that regard must be had to "what in such cases is practicable. The course is an account, "and the tenant for life to take the interest from the end of the "year." In dealing with the same subject matter in a further judgment delivered on the following day, he said: "The "utmost that can be contended by the plaintiffs is that what is "directed to be done shall be considered as done. They can "only therefore claim interest upon the capital, as it was at "the death. But here the capital is much increased. When a "testator gives interest of a fund, to be created by a sale as "soon as conveniently can be, he means only the interest from "the time the property can conveniently be sold. The whole "practice of the court is against such special directions as to "the value at the time of the death." The Lord Chancellor then expressed his opinion with regard to the unsold leaseholds as follows: "As to the leasehold premises that could not be "sold, they cannot be considered otherwise than as property "which it was for the benefit of all parties to suffer to remain in "specie; upon that I think the plaintiffs may have interest

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(1) 7 Ves. 89.

(2) 6 Ves. 520.

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" upon the value from the death; for there is a consideration " for that. The best decree in this cause will be to declare that " the property to be converted has been converted in a reasonable time; that the persons entitled for life shall have the " interest from that conversion; and as to the other leasehold " premises, that it being for the interest of all parties that " they should not be sold, a value shall be set upon them; and " the persons entitled for life shall have interest at 4 per cent. " upon that value from the death of the testator." The relevant part of the decree made in conformity with this judgment, will be found as a footnote to *Caldecott* v. *Caldecott* (1) and is as follows: " His Lordship . . . . doth order and decree it to " be referred to the Master to set a value on the leasehold " property of the said testator remaining unsold, as the same " was at the time of the death of the testator, and compute " interest thereon at the rate of 4*l*. per cent. per annum from " that time."

The case of *Howe* v. *Lord Dartmouth* (2) came before Lord Eldon three days after he had disposed of *Gibson* v. *Bott* (3). There was no trust or express direction for conversion in *Howe* v. *Lord Dartmouth* (2), but successive interests were created by Lord Strafford's will in his general personal estate. The testator died in 1791, and the first life tenant, Lady Anne Connolly, died some years later having received in her lifetime the full annual produce of the estate. Her right to do so was contested before Lord Eldon on behalf of the remaindermen on the ground that the tenant for life of such funds as bank annuities and long and short annuities was not entitled to the enjoyment of them in specie: but there was a standing rule of the court for the benefit of all parties interested that those funds should be laid out in the more equal fund, the 3 per cents.: that no party ought to suffer by the circumstances that what ought to have been done, and what the court would have directed to be done, immediately on the testator's death, was not done. The rights of the parties must be the same as if the testator had converted the property immediately before his death. Lady Anne's executors argued in the first place that as a matter of construction the gift of the personalty was a specific bequest and that she as life tenant had been entitled to enjoyment in specie—a contention, however, which the Lord Chancellor rejected. As an alternative they contended that there

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(1) 1 Y. & C. C. C. 320.

(2) 7 Ves. 137.

(3) 7 Ves. 89.

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was no fixed principle that executors were bound of necessity to make the conversion at the testator's death or any given time afterwards. The period of the conversion in that case, they said, was not the time of the testator's death, but the year 1796, when an order for sale had been made in the proceedings. Lord Eldon pointed out the equity of the general rule (designated nowadays by the name of that case), operating, as it does, equally on property in reversion as on assets in possession. "As in the one case that in which the tenant for life has too "great an interest is melted for the benefit of the rest, in the "other that of which, if it remained in specie, he might never "receive anything, is brought in; and he has immediately the "interest of its present worth." Further extracts from the Lord Chancellor's judgment, more relevant to the point immediately under consideration, are as follows (1): "The "purposes for which" (the personal estate) "is given are those "for which it is admitted there is a general rule, that these "perishable funds are to be converted in such a way as to "produce capital, bearing interest. I was astonished, when "that was doubted, from general recollection. I had considered "the practice to be that the first moment the observation of "the court was drawn to the fact, the court would not permit "property to be laid out or to remain upon such funds under a "direction to lay it out in government securities; but would "immediately order it to be converted into that which the "court deems for the execution of trusts a government "security. . . . . If the rule is that the fund shall not "remain, it is impossible to say the date of the decree shall "decide. . . . . If the principle is that the court, when its "observation is thrown upon it, will order the conversion, it "ought to be considered to all practicable purposes as converted "when it could be first converted . . . The account therefore "must go . . . . from the time at which it would have been "converted if the observation of the court had been drawn to "the fact that the executors were possessed of those funds." What that hypothetical moment of time actually was is not indicated either by the Lord Chancellor himself or by the report. As, however, he had expressly negatived the relevance of the date of the decree, and having regard to his former judgments in *Sitwell* v. *Bernard* (2) and *Gibson* v. *Bott* (3). I think it is reasonably clear that he intended the notional conversion to operate from a year after the testator's death.

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(1) 7 Ves. 149–152.

(2) 6 Ves. 520.

(3) 7 Ves. 89.

In *Dimes* v. *Scott* (1), to which I have already referred, residuary personalty was given on trust for conversion and the proceeds were settled for successive interests. The executors permitted a 10 per cent. security, part of the personal estate, to remain outstanding for several years and paid the whole interest received to the tenant for life. Lord Lyndhurst, in holding that the executors had misconveived their duties, said: "The directions of the will were most distinct; and according "to the case of *Howe* v. *Lord Dartmouth* (2), and the principles "of this court, it was the duty of the trustees to have sold the "property within the usual period after the testator's death. "If they neglected to sell it still, so far as regarded the tenant "for life, the property was to be considered as if it had been "duly converted." By the phrase "within the usual period "after the testator's death," the Lord Chancellor meant, as is indicated by his further observations at p. 209 of the report, within the period of a year. Finally, I should refer to two observations from the judgment of Sir John Romilly M.R., in *Morgan* v. *Morgan* (3)—which was a true *Howe* v. *Lord Dartmouth* (2) case, in that there was a settlement of a residuary personalty without any express direction to convert. "The "rule laid down in *Howe* v. *Lord Dartmouth* (2)," said the Master of the Rolls, "is that where property of a perishable nature is "given to be enjoyed in succession, the object of the testator "can only be effected by converting the property into "permanent annuities, and giving each person, in succession, "the dividends of the fund. . . . . The absence of any "direction to convert . . . . cannot be treated as an expression "of intention on the part of the testator that his property "was not ever to be converted; it would, I think, be unreason"able if it were so held. By law the property must be con"verted; a testator may not unreasonably be supposed to be "cognizant of that law, and to have given no direction on the "subject, because he may have supposed that it would be a "mere surplusage so to do."

The conclusions to be drawn from these authorities are, I think, as follows. Where residuary personalty was settled by will, and there was no sufficient indication that the testator intended the income beneficiaries to enjoy the property in specie, the court sought to do justice between all parties and to

(1) 4 Russ. 195.
(2) 7 Ves. 137.
(3) 14 Beav. 72.

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preserve that balance which the testator presumably intended and would have expressly directed had his mind been addressed to the question. As an essential element in this endeavour it was early recognized that a hypothetical conversion of hazardous or wasting property into safe and lasting securities should be assumed, in cases where it had not been converted in fact. There was no difficulty as to this in cases where there was an express trust for sale. The testator himself had contemplated and directed conversion, his personal representatives were bound to effect it, and the period of a year (the "executors "year") was taken as that within which this duty could reasonably and normally be performed. In other words, as it was necessary to have some general working rule governing the time of notional conversion, the fixing of that time became naturally related to the performance by the personal representatives of their administrative obligations and to the time within which they could usually be expected to perform them. I think it is reasonably clear from the judgments which I have quoted that this was the reason why the expiration of twelve months from the testator's death was taken as the time from which notional conversion should take effect, rather than the date of the death itself, or the date of the court's own order decreeing a sale. Where there was no trust for sale, the same point of time was selected by parity of reasoning. As stated by Sir John Romilly in *Morgan* v. *Morgan* (1) "by law the "property must be converted" in such cases and an obligation is thereby cast upon the executors to satisfy the law's requirement. That being so, no distinction could legitimately be drawn in this regard between cases where there was an express obligation to convert on the one hand and cases where the obligation was implied on the other. The conjunction of an obligation, and of a reasonable period for its performance, furnished, I think, in both classes of case, the real reason for selecting, as the time of notional conversion, the expiration of twelve months from the testator's death.

It now becomes necessary for me to refer to a case which I have mentioned earlier on in this judgment, namely, *Brown* v. *Gellatly* (2). In that case the testator, who died in March, 1862, left all his property to two named executors, giving them full power, except as thereinafter provided, to realize the same when and in such manner as they might see fit, without being personally responsible for such realization—to sail his ships for

(1) 14 Beav. 72. (2) L. R. 2 Ch. 751.

the benefit of his estate until they could be satisfactorily sold, without being responsible for any loss on any voyage—to sell his ships by public or private sale, and for the following purposes (which he then set out). The testator then settled the residue of his estate for successive interests. The will contained an investment clause which was of a rather limited scope but which empowered the executors to retain investments. At the time of his death the testator possessed investments some of which were within the investment clause whilst others were outside it. He was a shipowner and some of his ships were at sea and others sailed after his death and a considerable profit was made from the enterprises in which they were engaged. Questions arose between tenant for life and remaindermen in respect of the various properties, and administration proceedings were instituted. These came before Lord Cairns L.C. by way of appeal from the Master of the Rolls. Lord Cairns in his judgment and by his order drew a clear-cut distinction between the general unauthorized investments (namely, those outside the investment clause) on the one hand and the ships on the other; and it is that distinction which makes the case an important one for present purposes. As to the unauthorized investments he said: "It was the duty of the "trustees to convert them at the earliest moment at which they "properly could be converted. I do not mean to say that the "trustees were by any means open to censure for not having "converted them within the year, but I think that the rights "of the parties must be regulated as if they had been so "converted." With regard to the ships, the tenants for life argued that they were entitled to the whole of the profits earned subsequent to the death. Lord Cairns rejected that contention; observing that there was no indication of an intention that the ships were to remain unconverted for any specific time. He then proceeded: "The testator, who had "been engaged in the shipping business, knew perfectly well, "and shows that he knew, that some time would necessarily "be taken in converting the ships, and therefore he very wisely "provided that until they were sold the executors should have a "power which otherwise they would not have possessed, namely "the power to sail the ships for the purpose of making profit, "but, in giving that power, he does not give it as a power to "be exercised for the benefit of the tenant for life as against "the parties in remainder, or for the benefit of the parties in "remainder as against the interest of the tenant for life,

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"but says that it is to be exercised for the benefit of the estate, "meaning, as I apprehend, for the benefit of the estate "generally, without disarranging the equities between the "successive takers. I think therefore that with regard to the "ships the testator put them simply in the position of property "which was to be converted cautiously, and in proper time, "and as to which there was no breach of trust in the executors "delaying to convert it, but which, when converted, was to be "invested, and when invested, to be enjoyed as the residue "of his estate. In that state of things, it seems to me that the "case falls exactly within the third division pointed out by "Sir James Parker in the case of *Meyer* v. *Simonsen* (1) "and that a value must be set upon the ships as at the death "of the testator, and the tenant for life must have 4 per cent. "on such value, and the residue of the profits must, of course, "be invested, and become part of the estate." And an order was made accordingly. A reference to *Meyer* v. *Simonsen* (1) —which was a case of a settlement of residuary personalty, without a trust for sale—shows that the Vice-Chancellor mentioned three classes of case to which the principle of *Howe* v. *Lord Dartmouth* (2) applies, namely, firstly, where the subject matter of the bequest is invested already in some security of which the court approves; secondly, where part of the estate can be sold and converted so as not to sacrifice the interest of the tenant for life or of the remainderman (which the Vice-Chancellor described as partial conversion), and thirdly where property is so laid out as to be secure, and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate; there the rule is not to convert the property but to set a value on it and to give to the tenant for life 4 per cent. on such value, and the residue of the income must then be invested and the income of the investment paid to the tenant for life, but the corpus must be secured for the remainderman.

The reasoning of Lord Cairns in *Brown* v. *Gellatly* (3) confirms me in the conclusions which I have already expressed on a consideration of the earlier authorities. He recognized the existence of a duty on the executors to sell the testator's unauthorized investments but he limited this duty to such of the assets as could in fact be sold without sacrifice to the estate. In relation to such assets he accordingly made an order in

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(1) 5 De G. & Sm. 723.

(2) 7 Ves. 137.

(3) L. R. 2 Ch. 751.

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accordance with the principle established by *Dimes* v. *Scott* (1). With regard to the ships, however, which could not be sold except with care, he applied quite a different principle. The ships, he said, had been sailed for the benefit of the estate as a whole and were in the nature of property which was to be converted cautiously and as to which there was no breach of trust in the executors delaying to convert it. It is clear that the treatment which Lord Cairns accorded the ships, and the reasons which he gave for it, are by no means inapplicable to the case of property given on trust for sale with an unfettered power of postponement vested in the executors. In the latter case, as in the former, if the executors retain assets in their existing condition they do so for the benefit of the estate as a whole; and no breach of duty is committed in refraining from selling—provided, of course, that in so refraining they act bona fide. It was submitted before me in argument, however, that Lord Cairns' decision was wrong, so far as the ships were concerned, that it was inconsistent with the general trend of all the earlier decisions, and, in particular, was inconsistent with the views of Sir John Romilly as expressed in *Yates* v. *Yates* (2), and *In re Llewellyn's Trust* (3). As to the earlier decisions they were founded, in my judgment, as I have already indicated, on the existence of a duty and on the recognition that a reasonable period of time was required to perform it. They are therefore not applicable, of necessity, to a case in which that duty is absent.

In *Yates* v. *Yates* (4), the Master of the Rolls said: " Where a " testator gives property to trustees, with an absolute trust for " conversion, and with a discretion as to the time at which the " conversion shall take place, if, from any causes whatever, " arising from the exercise of the discretion and judgment of " the trustees, the conversion is delayed, then the tenant " for life is not to be prejudiced by that delay, but is to " have the same benefit as if the conversion had taken " place within reasonable time from the death of the " testator, which is usually fixed at twelve months from " that period."

In *In re Llewellyn's Trust* (3), a testator settled his real and personal estate on his wife for life with remainder to his children and authorized his trustees, at their discretion, with a view to facilitating the ultimate division of his property, to convert into

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(1) 4 Russ. 195.

(2) 28 Beav. 637.

(3) 29 Beav. 171.

(4) 28 Beav. 639.

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money his residuary personal estate and to sell his real estate, at such times and in such manner, in all respects, as they might deem necessary or advisable. His estate, at his death, comprised certain wasting or hazardous assets, including an interest, repayable to the estate by intalments, in a partnership. Sir John Romilly held that the widow was not entitled to enjoy leaseholds and perishable property in specie, but, so far as these assets were concerned, applied the principle of *Dimes* v. *Scott* (1). With regard to the partnership interest, the Master of the Rolls expressed himself as follows: " It appears there are " certain assets which cannot be realized instantly, that is to " say, the purchase money for the partnerships in which the " testator was engaged, his share of which, with interest, is " payable by instalments from time to time. With respect to " those, the rule laid down in *Meyer* v. *Simonsen* (2), " by Parker V.C. must be followed, namely, that it must be " treated as if the whole were realized at once, and the tenant " for life allowed 4 per cent. upon the value; because the court " cannot realize it, like mere outstanding personal estate, and " it is for the benefit of the estate that the instalments should be " paid in the manner arranged. They are payable, with interest " at 5 per cent.; but the tenant for life will not be entitled to " the whole interest but only to 4 per cent. The period for " ascertaining the value of the property will be twelve months " after the death of the testator, but the tenant for life will get " her income as from the testator's death."

Now, so far as the point now in issue is concerned, it is certainly difficult to reconcile these views, expressed and acted upon by Sir John Romilly, with the decision of Lord Cairns as to the ships in *Brown* v. *Gellatly* (3). I am inclined, however, to prefer the latter case to *Yates* v. *Yates* (4) and *In re Llewellyn's Trust* (5) for more than one reason. In the first place, it was later in date, and, having regard to the fact that the principles now in question were somewhat laboriously built up by the process of trial and error over a long period of time, this consideration is not without weight. Secondly, there can be no certainty that Sir John Romilly had present to his mind, as Lord Cairns assuredly had to his, the contrast between cases where trustees had an immediate duty to convert and cases where they had not. Thirdly, Lord Cairns' treatment of the ships was in entire accord with the order of Lord Eldon in

(1) 4 Russ. 194.
(2) 5 De G. & Sm. 723.
(3) L. R. 2 Ch. 751.
(4) 28 Beav. 637.
(5) 29 Beav. 171.

relation to the retained leaseholds in *Gibson* v. *Bott* (1). Fourthly, *Brown* v. *Gellatly* (2) has been frequently approved and was cited without any adverse comment by the Privy Council in *Wentworth* v. *Wentworth* (3). And, finally, not only was the order regarding the ships not inconsistent with previous authority, but it seems to me that it was plainly right. Notional conversion is very understandable when the executors are under a duty, express or implied, to sell; such a duty readily lets in the doctrine that equity regards that as done which ought to be done, and the notional conversion arising from the doctrine (subject only to a year's grace) acted as a convenient medium for preserving a balance between life tenant and remainderman. If no duty exists, however, the medium is not available, and another has to be found in its place. If there is no duty upon the executor to sell at once, or within a year, or at any other time, I can see no reason for assuming a notional conversion at once, or within a year, or at any other time. The essential equity, however—the balance between the successive interests—remains equally compelling even where there is no immediate obligation to convert and property is retained for the benefit of the estate as a whole. It is accordingly rational, and indeed obvious, to substitute a valuation of the testator's assets in the place of a hypothetical sale; and, if so, it is difficult to think of a better date for the valuation than the day when the testator died and the assets passed to his executors. In my judgment, accordingly, *Brown* v. *Gellatly* (2) is not legitimately open to attack on this point and afforded a satisfactory foundation for the orders in *In re Woods* (4) (though the judgment in that case is not in every respect easy to follow), *In re Chaytor* (5), *In re Owen* (6), *In re Beech* (7) and *In re Baker* (8). Although such is my view, and I have thought it right to express it, it would really be enough for me to say that the cases relied on by the first two defendants in these proceedings are, in my opinion, quite insufficient to support the suggestion that the five authorities to which I have just referred were, so far as the present point is concerned, contrary to established practice and should now be disregarded.

One other case was cited which does undoubtedly support

(1) 7 Ves. 89.
(2) L. R. 2 Ch. 751.
(3) [1900] A. C. 163.
(4) [1904] 2 Ch. 4.
(5) [1905] 1 Ch. 233.
(6) [1912] 1 Ch. 519.
(7) [1920] 1 Ch. 40.
(8) [1924] 2 Ch. 275.

Mr. Jenning's argument. The case was *In re Lynch Blosse* (1), a note of which appears at p. 27 of the Weekly Notes for 1899. According to that note, Stirling J. directed a valuation as at a year after the testator's death of residuary estate settled through the medium of a trust for sale with power to postpone conversion. There is no note of the argument in that case and practically none of the judgment and I cannot regard it as a guide of any value. There may well be other decisions also bearing on the question, for there is a mass of authority on the growth, development and application of the *Howe* v. *Lord Dartmouth* rule. Upon the best consideration that I can give, however, to the cases which were cited in argument by either side—and I have looked at one or two others since—I find no sufficient ground for departing from the *In re Woods* (2) line of decisions and I do not propose to do so. I shall accordingly declare that the valuation of all the unauthorized investments should be based on their respective values as at the 3rd September, 1936, which was the date of the testator's death.

The next question with which I have to deal is as to the rate of interest which ought to be allowed to the life tenants on the value of the unauthorized investments. For some years prior to *In re Beech* (3) the rate allowed had been 3 per cent., but Eve J. in that case, raised the rate to 4 per cent. and that is the rate which has prevailed ever since. Mr. Jenkins has invited me to say in the present case that, having regard to the reduced rate of interest now obtainable on trustee investments, the time has arrived to revert to the old rate, or, at all events, to say that not more than 3½ per cent. should be allowed now. I have had the advantage of certain evidence on this question, namely, an affidavit of Mr. Sydney Daly, who is an experienced stockbroker and has been a member of the London Stock Exchange for upwards of forty-five years. He says that he has gone closely into the question of the yield which might have been obtainable in September, 1936, and 1937, from investment at those dates in a miscellaneous list of investments authorized by law for the investment of trust moneys and in his opinion a fair average yield obtainable in September, 1936, would have been 3*l*. 12*s*. 2*d*. and in September, 1937, 3*l*. 16*s*. 1*d*. He then exhibits a document which gives particulars of how investments on those dates in five types of trustee investments would have produced those average yields. A reference to that document shows that the yields varied in September, 1936, from a minimum of 3*l*. 5*s*. 6*d*. to a maximum of 3*l*. 19*s*. 6*d*. The question whether the conditions which now prevail, in the year 1946, require a revision of the 4 per cent. rate re-introduced by Eve J. in *In re Beech* (1) is not before me. The only question I have to decide is whether the conditions which existed at the testator's death, namely, September, 1936, would have required such a revision then, had the matter been brought before the court. "A departure," said Eve J. in *In re Beech* (1) "from a "salutary rule in matters of this kind—introducing as it does "an element of uncertainty in practice and administration— "can only be justified if the changed conditions on which it is "founded continue at least as constant as those upon which "the rule was itself framed." It is true that on December 1, 1932, the interest rate of 5 per cent. War Stock was reduced to 3½ per cent. redeemable at option of the Government on or after December 1, 1952, and this, no doubt, had its effect on the rate of yield from other trustee investments. Nevertheless, I am not satisfied that the court, in September, 1936, would have regarded the conditions as having changed so materially, and for so long, as to justify an alteration in the 4 per cent. rate. Further, Farwell J. in *In re Fawcett* (2), whilst directing that the unauthorized investments should be valued as at January, 1935, said "The general, although not "the universal rule, is now to allow 4 per cent. and I see no "reason in the present case to depart from that modern "practice." In these circumstances, I will declare that the rate of interest to be allowed on the value of the unauthorized investments, when ascertained as aforesaid, should be 4 per cent. per annum.

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(1) [1899] W. N. 27.
(2) [1904] 2 Ch. 4.
(3) [1920] 1 Ch. 40.

Solicitor for all parties: *J. J. Hurdidge.*

(1) [1920] 2 Ch. 40.

(2) [1940] Ch. 102.

H. L. L.

ROXBURGH J.

1946

June 18.

In re JONES' WILL TRUSTS.

SOAMES AND ANOTHER *v.* ATTORNEY-GENERAL.

Revenue—Estate duty—Will and codicil—Annuities—Residuary estate in trust for nephew—Nephew not to have vested interest until twenty-five years of age—No disposition of income not required to answer annuities during period before nephew twenty-five years of age—Death of nephew under twenty-five years of age—Finance Act, 1894 (57 *&* 58 *Vict., c.* 30), *s.* 2, *sub-s.* 1 (*b*) ; *s.* 5, *sub-s.* 3*—Law of Property Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 16), *s.* 15, *sub-s.* 10*—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 31, *sub-s.* 1*—Finance Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 48.

A testatrix by her will bequeathed an annuity, directed her trustees to stand possessed of her residuary estate in trust for her nephew, but so that he should not have a vested interest in it until he attained the age of twenty-five years, created other trusts in favour of his children should he not attain that age and created ultimate trusts, should those trusts fail, in favour of named persons. She did not expressly dispose of the surplus income not required to answer the annuity during the period before the nephew attained the age of twenty-five years. By a codicil she bequeathed another annuity. The nephew was killed in action unmarried and without having attained the age of twenty-five years :—

Held, that, on the nephew's death, estate duty became payable on the capital of the residuary estate to which he was entitled under the will, including accumulations of income made while he was a minor, but excepting the proportions required to provide the annuities, and that the trustees of the will were accountable for the duty.

In re Turner's Will Trusts [1937] Ch. 15, and *Attorney-General* v. *Power and Another* [1906] 2 I. R. 272 considered.

ADJOURNED SUMMONS.

By her will dated January 31, 1934, the testatrix, Winifred Mary Oliver Jones, inter alia, bequeathed an annuity and directed her trustees to stand possessed of her residuary estate in trust for her nephew, Francis John Oliver Jones, but so that he should not acquire a vested interest therein until he attained the age of 25 years. She then created other trusts in favour of his children should he die without having attained that age and ultimate trusts in favour of named cousins in the event of the failure of the interests in favour of the nephew and his children. The will did not contain any express disposition of the surplus income not required to

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answer the annuity during the period before the nephew attained the age of 25 years. By a codicil, dated May 27, 1935, the testatrix bequeathed another annuity. On February 6, 1936, she died. On June 15, 1944, the nephew was killed in action, under 25 years of age and unmarried. By this summons the trustees of the will and codicil asked whether, on the nephew's death, estate duty became payable on the capital of the residuary estate to which he was contingently entitled under the will including accumulations of income thereof made while he was a minor, but excepting the proportions required for providing the annuities and whether the plaintiffs as trustees were accountable for the duty.

N. C. Armitage for the trustees. The determination of this question necessitates construction of sections of the Finance Act, 1894, the Law of Property Act, 1922, and the Trustee Act, 1925, and there is a slight amendment contained in the Finance Act, 1938 (1). There is a well established general

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(1) By Finance Act, 1894, s. 1: "In the case of every person dying "after the commencement of this "Part of this Act, there shall, save "as herein-after expressly pro- "vided, be levied and paid, upon "the principal value ascertained "as herein-after provided of all "property, real or personal, "settled or not settled, which "passes on the death of such per- "son a duty, called 'Estate duty,' "at the graduated rates herein- "after mentioned, and the exist- "ing duties mentioned in the First "Schedule to this Act shall not be "levied in respect of property "charged with such Estate duty."

By s. 2, sub-s. 1: "Property "passing on the death of the "deceased shall be deemed to "include the property following, "that is to say . . . . (*b*) Property "in which the deceased or any "other person had an interest "ceasing on the death of the "deceased, to the extent to which "a benefit accrues or arises by the "cesser of such interest; but "exclusive of property the interest "in which of the deceased or other "person was only an interest as "holder of an office, or recipient of "the benefits of a charity, or as "a corporation sole."

By s. 5, sub-s. 3: "In the case "of settled property, where the "interest of any person under the "settlement fails or determines by "reason of his death before it "becomes an interest in posses- "sion, and subsequent limitations "under the settlement continue "to subsist, the property shall not "be deemed to pass on his death."

By s. 7, sub-s. 7: "The value of "the benefit accruing or arising "from the cesser of an interest "ceasing on the death of the "deceased shall . . . . (*b*) if the "interest extended to less than the "whole income of the property, "be the principal value of an "addition to the property equal to "the income to which the interest "extended."

By Finance Act, 1938, s. 48: "Subsection 3 of section 5 of the

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principle that the existence of powers of maintenance does not make liable for death duties the fund out of which the maintenance can be provided. A mere right to maintenance, or possibility of being maintained, is not an interest in possession. Section 31 of the Trustee Act, 1925, was discussed in *In re Turner's Will Trusts* (1). In the judgment in that case, which was read by Romer L.J., it was stated that it was necessary to examine the statute law relating to the matters dealt with in s. 31 of the Trustee Act, 1935, as it existed at the time that that Act was passed. That had to be done because the Law of Property Act, 1922, was intended not to come into operation, but to serve as a foundation for the subsequent legislation of 1925. That is the course which the court should take in the present case also. It is clear from s. 15, sub-s. 10, of the Law of Property Act, 1922, most of which was reproduced in s. 16, sub-s. 4, of the Law of Property Act, 1925, that duties on property were never intended to be altered by the Act, which is to have no effect on death duties one way or the other. That provision ought to be treated as if it were also in the Trustee Act, 1925 and, where it refers to duties on land, ought to be construed as referring to all duties. It must therefore follow that duty is not payable on the capital of the residuary estate to which the nephew was entitled under the

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"principal Act shall have effect in "the case of a person dying after "the passing of this Act as if there "had been inserted at the end "thereof the words 'by reason "'only of the failure or deter-"'mination of that interest'."

By Law of Property Act, 1922, s. 15, sub-s. 10: "Nothing in this "Act shall alter any duty payable "in respect of land, or impose any "new duty thereon, or affect the "remedies of the said Commis-"sioners against any person other "than a purchaser or a person "deriving title under him."

By Trustee Act, 1925, s. 31, sub-s. 1: "Where any property "is held by trustees in trust for "any person for any interest "whatsoever, whether vested or "contingent, then, subject to any "prior interests or charges affect-"ing that property—(i.) during "the infancy of any such person, "if his interest so long continues, "the trustees may, at their sole "discretion . . . . apply for or "toward his maintenance, educa-"tion, or benefit, the whole or "such part, if any, of the income "of that property as may, in all "the circumstances, be reason-"able . . . . and (ii.) if such person "on attaining the age of twenty-"one years has not a vested "interest in such income, the "trustees shall thenceforth pay "the income of that property and "any accretion thereto under "subsection (2) of this section to "him, until he either attains a "vested interest therein or dies, "or until failure of his interest ". . . ."

(1) [1937] Ch. 15.

will. Thus, there is discharged the onus on the trustees of showing that the nephew's interest under the settlement contained in the will failed or determined by reason of his death before it became an interest in possession, and that s. 5, sub-s. 3, of the Finance Act, 1894, therefore applies. If it be contended that the interest in possession was an interest given by the statute, the answer is that whatever the interest given by the statute was, it was not an interest under the settlement. It was a purely statutory interest superimposed on the settlement, entirely subject to it and liable to be overridden by anything in it. [He referred also to *Attorney-General* v. *Power and Another* (1).]

J. H. Stamp for the Attorney-General. The case is in a small compass and need not raise any of these points. It can be decided from the Finance Act, 1894, and from s. 31 of the Trustee Act, 1925. The only question is whether the property is property in which the deceased, the nephew, had an interest at his death. A mere power of maintenance is not an "interest," but a specified actual sum is, and brings into operation s. 2 of the Finance Act, 1894: *Attorney-General* v. *Power and Another* (1). This is a "res ipsa loquitur" case under the statute. If the property is property in which the deceased had an interest ceasing on his death, nothing more is required: res ipsa loquitur. Therefore there is no need to consider whether the property is settled or not, or whether the interest arises under the settlement. If it is an independent interest arising outside the settlement, it is caught by Finance Act, 1894, s. 2. [He referred to *Attorney-General* v. *Power and Another* (1).] *Attorney-General* v. *Coole* (2) is not unlike the present case, save that in that case the interest of the deceased was an annuity for a fixed amount given for maintenance. In that case the court distinguished *Attorney-General* v. *Power and Another* (1) and it ought to do so in the present case, and to hold that estate duty is payable.

ROXBURGH J. [after stating the facts, continued :] The will contains no express disposition of the surplus income of the residuary estate not required to answer the annuities during the period before the nephew attained the age of 25 years, so that the disposition of that income fell to be regulated by s. 31, sub-s. 1, of the Trustee Act, 1925. Accordingly, during the period between March 16, 1942—the date on which the

(1) [1906] 2 I. R. 272.

(2) [1921] 3 K. B. 607.

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nephew attained the age of 21 years—and June 15, 1944—the date of his death—he was entitled to receive the whole of the surplus income of the residuary estate. The trustees had no option in the matter. He was entitled to receive the whole of it, and whether he actually did or did not receive the whole of it during his lifetime is immaterial.

That being so, the Crown contends that estate duty is payable under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, and that, as the surplus income was payable in its entirety to the nephew from March 16, 1942, until his death and ceased to be payable to him on his death, estate duty is prima facie payable. Mr. Armitage, for the trustees, says that that may be so, but contends that the case falls within the exception in s. 5, sub-s. 3, of the Finance Act, 1894. It seems to me that Mr. Armitage is really on the horns of a dilemma. On the one hand it is possible to contend that the interest which the nephew had in the residuary estate arose, not under the settlement, but under s. 31, sub-s. 1, of the Trustee Act, 1925. If, however, that contention be well founded, s. 5, sub-s. 3, of the Finance Act, 1894, has no application, because the interest which has ceased is not an interest "under the "settlement," but an interest under the statute. On the other hand, it may be contended that the interest of the nephew in the residuary estate was derived under the settlement and that the particular sums of money which he became entitled to receive during his life were receivable under the settlement and the Trustee Act, 1925, in combination. If so, then it is impossible to say that his interest never became an interest in possession. Accordingly, the Crown's claim is well founded.

Mr. Armitage invited me to read s. 31, sub-s. 1 (ii.) of the Trustee Act, 1925, as though it contained a provision that it should not alter the incidence of any duty. The ingenious process by which he suggested that I should arrive at that conclusion was as follows: First, he said, I am to look at *In re Turner's Will Trusts* (1), and I am to consider myself directed by that decision to look at the Law of Property Act, 1922. Pursuant to that direction I am to look at s. 15 of the Law of Property Act, 1922. He says that I am further directed by *In re Turner's Will Trusts* (1) to deem that the provision contained in that section—which was, in fact, incorporated in s. 16, sub-s. 4, of the Law of Property Act,

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(1) [1937] Ch. 15.

1925—has also been incorporated in the Trustee Act, 1925, and that I am to hold that, when it refers to duties on land, it is to be construed as if it referred to all duties. By that process I am to reach the conclusion that no duty is payable in the present case. I do not feel able to steer that course. I am not sure how far Mr. Armitage relied on *Attorney-General* v. *Power and Another* (1). The head-note in that case is as follows: "Where, under a settlement, H. took a vested legal "estate as tenant in common in fee, with a limitation over "on his dying under 21, subject to a proviso that during his "minority trustees were to enter into receipt of the rents, "providing thereout for his maintenance, &c., and to "accumulate the surplus upon trust, if he should attain his "age, for him; but if he should die under age, for the persons "who should ultimately become indefeasibly entitled; and "H. dying under age, the defendants became indefeasibly "entitled as tenants in fee of all the lands in the settlement, "including H.'s share: *Held*, that estate duty was not "payable as on a property passing on H.'s death; that H.'s "interest had not become a beneficial interest in possession in "the lands at his death; and that, accordingly, section 5, "sub-section 3 of the Finance Act, 1894 was applicable. "*Held*, also, that the real nature of the transaction must be "considered, and not only the conveyancing form. *Semble:* "that estate duty might be payable on the actual sums "received by H. for maintenance, upon the analogy of the "provision with regard to legacy duty, under 36 Geo. 3, "c. 52, s. 11, and 54 Geo. 3, c. 92, s. 12 (Ir.)."

I am not concerned in the present case with powers of maintenance by trustees during a minority. That is quite a different matter. I am concerned with a case where a person of full age was, under the statute, entitled to be paid the whole surplus income year by year until he attained the age of 25 years, when he would become entitled to the capital if he so long lived: and, on the whole, I think that *Attorney-General* v. *Power and Another* (1) is more in favour of the Crown than against it. I take that view because that case proceeds on admissions by the Crown which are set out by Palles C.B. in the following passage in his judgment: (2) "It "has been admitted by the Crown and, as I think, rightly, "that although this proviso may not vest a legal estate in "the trustees, it was sufficient in equity effectually to capture

(1) [1906] 2 I. R. 272. (2) Ibid. 277.

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"the rents and profits of Hubert's third share, from his father's "death in 1892, to his own death in 1898, and to dedicate "them to the trusts thereby declared . . . ." Later Palles C.B. said (1) "Had Hubert here been entitled to the "entire surplus of the rents and profits of his share, I should "have held his estate was one in possession; but being, as "I hold him to be, entitled to part only of that surplus, and that "fluctuating, uncertain, and incapable of being defined or "ascertained irrespective of its application, I must hold that "his estate is not in possession, and that such sums as he "might receive for maintenance were payable to him, not "by reason of his vested estate, which must be taken to be "subject to the estate or interest of the trustees, but as "maintenance eo nomine out of the express trust for its "payment to him out of the interim income of an estate, the "present income of which was not his, but the trustees."

In the present case, the nephew was plainly entitled to the entire surplus income between March 16, 1942, and June 15, 1944. Accordingly, there is nothing in *Attorney-General* v. *Power and Another* (2) which will save this estate from estate duty. For this duty the trustees are accountable. The applicants will pay the Crown's costs as between party and party.

Solicitors: *Herbert Smith & Co.; Solicitor of Inland Revenue.*

(1) [1906] 2 I. R. 280. (2) Ibid. 272.

K. R. A. H.

WYNN-PARRY J.

1946

June 5.

JARRETT *v.* BARCLAYS BANK, LIMITED AND NASH.

NASH *v.* JARRETT.

Emergency legislation—Mortgage—Charge by wife to bank of freeholds to secure joint account of husband and wife—Businesses carried on by husband and wife on freeholds—Bankruptcy of wife—Authority of trustee in bankruptcy to husband and wife to remain on freeholds and carry on business—Summons by bank for leave to sell freeholds —Trustee in bankruptcy sole respondent—Death of wife before hearing of summons—Husband sole executor—Sale after order giving leave—Continued occupation by husband—Action by husband for rescission and by purchaser for possession—Parties to summons—Objection to *action of husband as misconceived—" Person . . . . affected by the " granting of the application "—Courts (Emergency Powers) Act,* 1943 (6 *&* 7 *Geo.* 6, *c.* 19), *s.* 4, *sub-ss.* 3, 4—*Courts (Emergency Powers) Rules,* 1943 (*St. R. & O.* 1943, *No.* 1113/*L.* 22), *r.* 20, *para.* 1 (*iv.*) *; paras.* 2, 3.

The owner of freehold property, on which she and her husband each carried on their separate businesses, charged that property to a bank to secure moneys due on the joint account of her husband and herself. She was subsequently adjudicated bankrupt and a letter written to her husband a few days later contained the statement " . . . . the Official Receiver "—he having been appointed the wife's trustee in bankruptcy—" . . . . gives you authority to " open your business at once." The bank issued a summons under the Courts (Emergency Powers) Act, 1943, for leave to exercise any right or remedy arising by virtue of default in the payment of the mortgage money, and served the summons on the trustee in bankruptcy as sole respondent. On issuing the summons the bank did not lodge in chambers a statement giving the names of the wife and husband as persons " affected by the granting of the application " within r. 20 of the Courts (Emergency Powers) Rules, 1943. The wife died without having obtained her discharge from bankruptcy and the application on the summons was made ex parte, the trustee in bankruptcy having made a written statement that he had no objection to the leave sought being given. On the application the court granted the leave, whereupon the bank sold the property. The husband brought an action against the bank and the purchaser for, inter alia, a declaration that valid leave had not been given and for rescission. He contended that the sale was invalid on the grounds, first, that he and the wife ought to have been joined as respondents or that a statement pursuant to r. 20 ought to have been lodged in chambers and, secondly, that the bank had sold the property at an undervalue.

On a preliminary objection by the defendants that the action was misconceived and could not succeed on either ground :—

Held, that the preliminary objection was well founded with regard to both grounds. The letter to the husband did no more than give him authority to remain on the property and carry on business there, and he was a mere licensee. The class of persons with regard to whom statements giving their names as persons " affected by the granting of the application " are to be left in chambers pursuant to r. 20, para. 2 is limited to persons who, because they have a legal or equitable remedy which the court can enforce or protect, are affected by the exercise of any right or remedy mentioned in the rules. At the date of the issuing of the summons on the application for leave to sell, the wife had no interest of that kind in the property. The husband had no interest in it, either at the date of the hearing of the application or at any other time. Neither as his wife's executor nor as occupier had he any locus standi to assert that the sale had been made at an undervalue, and his position as jointly and severally liable on the overdraft was that the mortgage, which was a mortgage by the

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wife of her own property, did not give him any right against the bank or the property.

In re Leadbitter (1878) 10 Ch. D. 388 and *Bird* v. *Philpott* [1900] 1 Ch. 822 considered and applied.

WITNESS ACTIONS.

By the first action the executor of a mortgagor of property which had been sold by the mortgagee, a bank, claimed, inter alia, rescission of the sale and an injunction to restrain the bank and the purchaser from interfering with his occupation of the property. By the second action, the purchaser claimed against the executor possession of the property.

By a legal charge dated April 26, 1939, Mrs. Jarrett (hereinafter called " the wife ") charged certain freeholds to the bank to secure the joint account of herself and Mr. Jarrett (hereinafter called " the husband "). On May 15, 1940, the wife was adjudicated bankrupt. The official receiver was appointed her trustee in bankruptcy. On May 20, 1940, a firm of estate agents wrote to the husband : " . . . . We " have to-day spoken to the Official Receiver and he gives you " authority to open your business at once." On January 10, 1941, the bank wrote to the husband and the wife stating that, while the bank was fully aware of circumstances, they could hardly expect to be allowed to remain in occupation rent free, and asking them to let the bank know what amount they could pay by weekly or monthly contributions. On March 9, 1943, the bank wrote to the husband stating that the amount due on the overdraft had by that date reached 2,229*l.* and asked him to do all in his power to reduce it. In the same letter the bank then referred to the fact that the husband was carrying on a tobacconist's business on the mortgaged property and to the fact that he was also in employment, and stated that, in view of that, it considered that he could make some payment towards the interest on the overdraft. The letter contained also the statement : " You are in occupation of the premises " charged to the bank and therefore it is thought that some " contribution should be made, at least equivalent to a rental " . . . . kindly let us know how much you can provide by " weekly or monthly instalments." On March 17, 1943, the husband wrote replying that it was utterly impossible for him to pay anything off the overdraft. On June 12, 1943, the bank wrote to him " . . . . kindly inform us . . . . if your " house has been damaged in any way through enemy action, " if so it will be necessary for us to register our name as " mortgagees in the claim you will have to make." Early in

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1945 the bank agreed the terms of a conditional contract for the sale of the property to Mr. Nash (hereinafter called "the purchaser"), one term being that the bank should not be required to give vacant possession. On March 22, 1945, the bank sent to the official receiver (hereinafter called "the trustee"), the wife and the husband letters which stated, in effect, that there was due from the husband and the wife on the joint account 2,290*l.* 0*s.* 4*d.* The letters to the trustee and to the wife were expressed to be written pursuant to the legal charge: that to the husband was not so expressed to be written. On April 17, 1945, the bank's solicitors wrote to the husband's then solicitor: ". . . . our clients have served the requisite notice under the terms of their security calling in the money. This notice was served upon [the trustee] in the bankruptcy of [the wife] and a similar notice was served upon her and [the husband], although in our opinion this was unnecessary. In the absence of compliance with the notice our clients are proposing to enter into a conditional contract for the sale of the property subject to the necessary consent to the exercising of their power of sale being obtained from the court . . . . our clients are still prepared to consider the acceptance by your clients or either of them of the amount due to our clients to clear the loan and interest thereon. Will you kindly let us know if your clients are interested in the matter and failing a notification from you to this effect within seven days our clients will proceed with their proposed contract." On April 21, 1945, the husband's then solicitor replied that the husband and wife were not in a position to find the money to clear the bank's loan and interest. On August 23, 1945, the bank issued a summons under the Courts (Emergency Powers) Act, 1943, asking, in effect, that the bar created by the Act be lifted, the summons being addressed to the trustee as sole respondent. On the same date the bank's London solicitors wrote a letter to the trustee. Therein they called attention to the letter of March 22, 1945, to the trustee, stated that the bank had entered into a conditional contract for the sale of the property for 2,250*l.*, and pointed out that the bank had to obtain the court's consent under the Courts (Emergency Powers) Act, 1943. The letter contained also the statements that the trustee had been made a respondent to the application under r. 20 of the Courts (Emergency Powers) Rules, 1943, but that, under the proviso in sub-para. (iv.) of that rule, if the bank obtained from him a written statement that he had no objection to leave being given, the application could be made ex parte. On September 4, 1945, the trustee wrote in reply that he had no objection to leave to sell being given. On October 12, 1945, the wife died without having obtained her discharge from bankruptcy. On October 18, 1945, the summons came before the master. Neither the husband nor the wife was made a respondent to it, nor was any statement left in chambers giving the names of the husband and the wife as persons "affected by the granting of the application" within r. 20 of the Courts (Emergency Powers) Rules, 1943 (1).

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(1) By s. 4, sub-s. 3, of the Courts (Emergency Powers) Act, 1943: "Where an application is "made by the mortgagee of any "property for leave to exercise "against the property any . . . . "right or remedy arising by virtue "of a default in the payment of "any mortgage money the . . . . "court may . . . . treat any person appearing to the court to be "affected by the exercise of the "right or remedy as if he were the "person liable to pay the mortgage "money or . . . . were the "mortgagor, and may grant relief "accordingly."

By sub-s. 4: "The last foregoing sub-section shall not be "taken as requiring all the persons so affected to be made "parties to the application, and "rules made under this Act . . . . "may provide that, in such cases "as may be prescribed by the "rules . . . . the application may "be made ex parte."

By r. 20, para. 1 of the Courts (Emergency Powers) Rules, 1943: "Subject to the provisions of "para. 2 of this rule, the persons "to be made respondents to an "application by a mortgagee of "property for leave to exercise "against the property any right "or remedy shall be . . . . "(iv.) Where the equity of "redemption is vested in a trustee, "the trustee: Provided that if the "equity of redemption is vested "in a trustee as trustee in bankruptcy and the applicant has "before making the application "obtained from such trustee a "written statement that he has "no objection to the leave sought "being given, the application "may be made ex parte."

By para. 2: "In any application in which a person who is "not a respondent to the summons "under . . . . para. (1.) . . . . would "be affected by the exercise of "any such right or remedy . . . . "the applicant shall . . . . leave "at chambers . . . . a statement "giving the name of such person "and showing what his interest is "in the mortgaged property, and "the court or a judge may direct "that such person, or any other "person who the court or a judge "may think would be affected by "the granting of the application, "be added as the respondent to "the application."

By para. 3: "If the mortgagee "is uncertain as to what persons "would be affected by the granting of the application, he may "issue the application ex parte, "and . . . . leave at chambers a "statement giving the names of all "persons who he thinks may be "affected and showing the interests of such persons, and the "court or a judge may direct "which . . . . are to be made "respondents."

The master gave the bank leave to sell and dispensed with proof of service on the trustee. On November 6, 1945, the bank's solicitors informed the husband's then solicitor that the application had been made and leave to sell obtained and on December 12, 1945, the sale and purchase were completed, the bank conveying the property to the purchaser for 2,250*l*. By the first action, the writ in which was issued on January 25, 1946, the husband, for himself and as the wife's executor, claimed a declaration that no valid notice under s. 103 of the Law of Property Act, 1925—which regulates the exercise of a power of sale—existed or had at any time existed and that no valid leave of the court under the Courts (Emergency Powers) Act, 1943, had been given entitling the defendants to effect a sale of the property and that 2,250*l*. was not a proper price for it. He claimed also rescission and an injunction to restrain the defendants from interfering with his occupation of the property. By the second action, the writ in which was issued on February 19, 1946, the purchaser claimed against the husband, inter alia, possession of the property, the husband counterclaiming, inter alia, that he was entitled to redeem the mortgage comprised in the legal charge to the bank. The husband contended that the sale was invalid, first, on the ground that he and the wife ought to have been joined as respondents to the summons issued under the Courts (Emergency Powers) Act, 1943, or that a statement ought to have been lodged in chambers giving their names as "persons " . . . . affected" within the meaning of r. 20, para. 3 of the Courts (Emergency Powers) Rules, 1943, and, secondly, on the ground that the bank effected the sale at a price so low as to constitute a fraud on the husband and on the wife's estate. At the end of the opening of the case for the husband in the first action, a preliminary objection was taken that the action was misconceived and could not succeed on either ground.

Milner Holland for the bank. The contention that the husband and wife ought to have been made respondents to the summons issued under the Courts (Emergency Powers) Act, 1943, is ill founded. Rule 20, para. 1 (iv.) of the Courts (Emergency Powers) Rules, 1943, provides that a trustee in whom the equity of redemption is vested shall be made respondent and that where, as in the present case, that trustee is the trustee in bankruptcy from whom, before the making of the application, there has been obtained—also as in the present case—a written statement that he has no objection to the leave sought being given, the application may be made ex parte. In such circumstances it would be unnecessary and unjustifiable to add the bankrupt and, after the bankrupt's death, his or her personal representative, as respondent. In the present case the wife was not, and the husband is not, within the class of persons referred to in r. 20, para. 2. In order to come within that class it is necessary to have, at all material times, in the property in question, an interest which the person concerned can ask the court to enforce or protect. At no material time could the wife have done that and the husband could never have done it and cannot do it now. He has no claim as the wife's executor. On her being adjudicated bankrupt all her property vested in the trustee under s. 53 of the Bankruptcy Act, 1914. Thenceforth she could not deal with it at all: only the trustee could deal with it: *In re Leadbitter* (1). Further, the husband has no claim as occupier of the property. It was at all material times the wife's property and has never belonged to him. Also, the fact that he was and is jointly and severally liable on the overdraft does not help him on this point. True, he was equally liable with the wife, but it was only the wife who gave the bank security to cover the overdraft. That security was entirely her own property in which the husband had, and has, no interest whatever. It is by no means established either that the bank was bound to exercise due care not to sell at an undervalue, or that it sold at so gross an undervalue that it cannot have exercised that care. Even if, however, those two points were proved, that would not give the husband the right to have the sale set aside.

David Jenkins K.C. and *Cloutman K.C.* for the purchaser. Since he has been in occupation of the premises the husband has not paid any rent. Therefore, even if the bank had sold the property at an undervalue—which it is not proved either to have been under a duty to take care not to do or, in fact, to have done—he could not be heard to say that he had suffered any loss and, accordingly, he would not have an action for damages. One term of the bank's contract for sale was that it should not be required to give vacant possession. Thus, the bank's application by summons was not for vacant possession, but for leave to sell. Any interference with the husband's possession would be, not by the bank, but by the

(1) (1878) 10 Ch. D. 388.

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purchaser, who is himself asking for possession against the husband. When the wife was alive, she could have redeemed the mortgage. The husband, however, has not a right to redeem it either as executor or as occupier. Had the bank not applied for leave to sell and obtained it but, instead, had proceeded against the husband for the whole amount of the overdraft, as it could have done, the husband could have claimed to be subrogated with regard to half of that whole amount. That, however, was just what the bank did not do, and the husband cannot now claim to be interested in the money obtained by the bank for the property simply because he was and is jointly and severally liable for the whole of the amount due on the overdraft. The overdraft is one thing, the property another and quite separate thing: and the only effect on the husband of the sale of the property by the bank is that his liability on the overdraft is reduced in proportion to the amount paid for the property. In March, 1945, 2,290*l*. 0*s*. 4*d*. was due from the husband and wife on the joint account. The practical result of the sale, therefore, in so far as it concerns the husband, is very much to his advantage, seeing that only 40*l*. 0*s*. 4*d*. remains to be paid off. On the other hand, had the bank not sold the property but proceeded against him, he would have been liable for at least 1,125*l*.

Fortune for the husband. The contention that the wife had no interest in the property after she had been adjudicated a bankrupt is ill founded. She had a very real interest in its being sold at a price which would at least wipe out the overdraft and, if possible, leave something over: *Bird* v. *Philpott* (1): and the interest which she then had is the interest which the husband, as her executor, has now. Also, whatever her position may have been, the husband's is something more than that of a mere licensee. It is in evidence that, apart from the garage proprietor's business, which was the wife's, he has been carrying on a tobacconist's business on the property and the bank went so far as to describe him as being in occupation of the property and to describe the amount which it thought that he ought to contribute to the interest on the overdraft as "at least equivalent to a rental." A sum which is the interest on an overdraft is not described, in the letter in which the person liable is requested to pay it, as "equivalent to a rental" unless that person is definitely associated, in the mind of the writer of the letter, with rent

(1) [1900] 1 Ch. 822.

and, therefore, also with tenancy. Also, if the bank was prepared to accept from him an amount of that nature by reference to the premises as well as to the overdraft, it is clear that the bank was treating him as interested in the premises at least to the extent of being in occupation of them. Again, in the letter to him of June 12, 1943, with regard to war damage, the bank describes the property as "your" house and mentions "the claim 'you' will have to make." Even the fact that the letter to him of March 22, 1945, was deliberately not expressed to be written pursuant to the legal charge does not show that the bank regarded him as not having any interest in the property. It shows merely that it did not treat him as a mortgagor but did regard him as having an interest in the property by virtue of his liability on the overdraft. If the bank considered that he had no interest whatever in the property, the logical course would have been not to write to him at all. He was, of course, interested to the same extent as was the wife after her bankruptcy, namely, in the property's producing, on sale, enough to pay off the overdraft and leave something over. All these considerations, coupled with the initial facts that the trustee gave the husband authority to open his business "at once" and that the husband has all the time carried on his own business there as a tobacconist, point to his being not a licensee but a tenant at will. Even so his position is none too secure, as it can be terminated at any time by notice: but it is stronger than that of a mere licensee. His action, therefore, is not misconceived, and he has a locus standi to proceed with it.

WYNN-PARRY J. [after stating the facts, continued:] In my judgment, the letter of May 20, 1940, to the husband did no more than give him authority to remain on the garage premises and carry on the business there. Also, I see nothing in any of the letters of January 10, March 9 and 17 and June 12, 1943, which operated to alter the husband's position as licensee and to establish instead the relationship of landlord and tenant between the bank and him. My attention has not been drawn to any document or other evidence which, to my mind, establishes in any degree that he became a tenant of the bank or of anyone else.

In my view, the preliminary objection is well founded with regard to each ground. Taking, first, the contention that the sale ought to be set aside on the ground that it was effected at an undervalue, the husband claims relief under one or more of three heads: first, as the wife's executor, secondly, as occupant of the premises and, thirdly, as the person jointly and severally liable for the overdraft.

I will deal first with his position as the wife's executor. On the wife's being adjudicated bankrupt, all her property passed to and vested in the trustee under s. 53 of the Bankruptcy Act, 1914. Thereafter, only the trustee could deal with the property, only he could effectively complain against the mortgagee, only he could settle accounts with the mortgagee, the bank. The bankrupt, the wife, could not go behind the trustee. Authority illustrating that proposition, though hardly necessary, is to be found in *In re Leadbitter* (1). The headnote to that case is: "A bankrupt who has obtained his discharge "and who has become entitled to the surplus of his estate, all "the creditors having been paid in full, is not entitled, under "the 39th section of the Solicitors Act (6 & 7 Vict., c. 73), to "obtain the taxation of a bill of costs paid by the trustee in "the bankruptcy. The trustee in bankruptcy does not stand "in the position of a trustee for the bankrupt." Bacon V.-C. in the course of his judgment says (2): "The fallacy of the "argument is that this bill of costs was paid by the applicant's "trustee. The applicant in effect says, 'This money was paid "'by my trustee out of my property.' But the statute has "no application to the case of a trustee in bankruptcy. The "trustee in bankruptcy was not the applicant's trustee—the "property was not the applicant's property. It was the "property of his creditors; and the money was paid out of "that which had been once, but had ceased to be, the "applicant's estate. The applicant, at the time of payment, "had no present interest in it, nor in any particle of it." The case went to the Court of Appeal, where the decision of Bacon V.-C. was affirmed, and in the course of his judgment Sir George Jessel M.R. said (3): "In the second place, the "bankrupt is not a 'person interested' in the property out "of which the bill was paid. At the time when the bill was "paid there was no surplus, but only a possibility of a surplus. "A legacy might be left, or a reversion might fall in, but at "most there was no more than a probability of a surplus. "There was no surplus till all the debts had been paid in full; "therefore, pending the bankruptcy, the bankrupt was not

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(1) 10 Ch. D. 388.

(2) Ibid. 389.

(3) Ibid. 391.

"a person interested in the property; the probability of "a surplus could not make him so." The mere fact that a bankrupt has a future interest in a possible surplus does not mean that he has a present interest and there is, in my view, nothing but confirmation of this proposition to be found in *Bird* v. *Philpott* (1), which Mr. Fortune, for the husband, cited in favour of his argument. In my judgment, therefore, the husband, as the wife's executor, has no locus standi to assert that the sale was made at an undervalue.

I turn now to the husband's contention that as occupier he is entitled to complain that the sale was made at an undervalue. Mr. Fortune tried to argue that the husband was a tenant at will but, as I have said, I have no evidence that he was ever a tenant of any description. In my judgment, on the evidence before me he was no more than a mere licensee. He was a person in the premises on sufference and, as such, he had, in my judgment, no locus standi to complain of the price at which the property was sold.

I pass, then, to consider his position as a person jointly and severally liable for the overdraft. This is an ordinary case of a joint and several liability to pay an overdraft. The bank took security from one of the debtors—namely, the wife—to secure her liability and that was a transaction solely between her and the bank. Even assuming that the bank had a duty so to exercise care as not to sell at an undervalue and that in fact it did sell at such an undervalue as constituted the sale a breach of that duty—two large assumptions—those considerations could not, in my judgment, give the husband, as a person jointly and severally liable for the overdraft, any right to have the sale set aside, for the property was not his and he had no interest in it. Nor, as Mr. Jenkins, for the purchaser, pointed out, could he have any right to damages. He had paid nothing during his occupancy and he had lost nothing, even if the sale was at an undervalue. Doubtless, had the bank sued him, he could have met it by contending that it could have realized the property at a higher figure and that, had it done so, he would have owed it less or even nothing; and, had he established that contention, he could have obtained, accordingly, a reduction or an elimination of the bank's claim. With that aspect of the matter, however, I am not concerned.

On the view which I have expressed on the question of sale

(1) [1900] 1 Ch. 822.

at an undervalue there cannot, in my judgment, be anything in the point which was taken under the Courts (Emergency Powers) Act, 1943, but, as it has been argued, I will deal with it. [His Lordship read s. 4, sub-s. 3 and s. 7, sub-s. 2 of the Act—which latter sub-section provides for making rules—and r. 20, para. 1 (iv.) and paras. 2 and 3 of the Courts (Emergency Powers) Rules, 1943, and continued :] The scheme of those three paragraphs appears to me to be plain. Paragraph 1 provides who, in given circumstances, must be joined as respondents. Paragraph 2 provides for the presence of persons who are not specified in para. 1, but who fall within the class circumscribed by the language of para. 2. That class is, in my judgment, clearly limited to persons who can be said to be affected by the exercise of any right or remedy mentioned in the rules because they have an interest in the mortgaged property. In my judgment it is, as a matter of construction, essential, before any person can be said to fall within the class referred to in para. 2, that it should be capable of being demonstrated that that person has an interest in the mortgaged property : and by " interest " is meant, in my judgment, some legal or equitable interest which can be enforced in or protected by a court. This scheme is extended by para. 3, which deals on exactly the same basis with the case where the mortgagee is in some doubt who should be included in the statement.

With that view of the relevant section and rule in mind, I proceed to consider the husband's position under the same three heads. Treating him first as suing as the wife's executor, it is, in my judgment, quite plain that he is not entitled to any relief. At the relevant time the wife was alive and was an undischarged bankrupt. Under r. 20, para. 1 (iv.) there is express provision for making the trustee in bankruptcy a respondent, which course was followed. If the wife also was to be entitled to be heard, it would have had to be under para. 2 or para. 3. In view of the earlier provision of para. 1 (iv.), it would, in my judgment, be startling to find that the applicant must bring in the bankrupt or his or her personal representative. To do so would, I think, be to increase many-fold the difficulties of administering the bankruptcy law, if not to make it impossible. But there is, of course, a very good reason for not doing so, namely, that—as appears from the authorities to which I have already referred—at the date of the application the bankrupt had no interest in the property and therefore was not a person in respect of whom it could be specified, in the statement referred to in paras 2 and 3, what her interest was in the mortgaged property.

I proceed next to deal with the husband's position as occupier. As Mr. Jenkins pointed out, there is a short answer under this head. The bank applied for leave, not to take possession, but only to sell. Therefore the husband's occupancy, whatever its nature, could not be affected. I desire, however, to go further and to repeat what I said with regard to the first point, namely, that, in my judgment, the husband's position as occupier was not such as to give him any interest in the land.

Dealing, thirdly and lastly, with the husband's position as a person jointly and severally liable on the overdraft, it is, I think, important to emphasize that, while both he and the wife were liable to the bank, the mortgage, as I have already pointed out, was by the wife, of her property, to secure her liability. That transaction was entirely between her and the bank and therefore could not give the husband, as a joint and several debtor, any right against the bank, much less any interest in the property. As Mr. Jenkins pointed out, the husband could have become interested in the property only in events which did not happen. The bank could have sued for the whole debt without realizing its security and the husband, had it recovered from him, could have invoked the doctrine of subrogation so as to adjust matters between himself and the wife but, in that event, it would have been in respect of only one half of the debt that he could have claimed to be subrogated. In fact, instead of suing the husband, the bank proceeded against the property, to which end it applied for leave to sell. It is impossible to regard the husband, merely by reason of his joint and several liability, as a person affected by or interested in that realization. As I have pointed out, the rules are directed to persons having an interest in the mortgaged property and the husband had no interest in the mortgaged property in the present case. The only effect on him of the realization was that what the bank realized would reduce pro tanto, out of somebody else's property, his liability to the bank. It is pointed out with considerable force that the effect of the sale for 2,250*l*. was the receipt of a sum sufficient to discharge the whole of the joint and several liability except to the extent of about 40*l*., whereas the husband, as between himself and the trustee, ought to

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have borne one half of the debt, there being no equity to throw the whole burden on the wife's estate. The husband is therefore saying that he is affected because, in the result, he did not get a benefit to which he was never entitled: and, indeed, there may be a claim by the trustee against him for contribution.

For these reasons the preliminary points are, in my judgment, well taken. The first action is misconceived and cannot succeed, whatever be the evidence led to support it, and I therefore dismiss it with costs. The second action must succeed and the relief claimed in it be granted, with costs, and the counterclaim in that action must be dismissed, with costs.

Solicitors: *Lake & Son, for Roach, Pittis & Co., Newport, Isle of Wight; Woolley & Whitfield, for John Robinson & Jarvis, Ryde; Warren & Warren, for Buckell & Drew, Newport, Isle of Wight.*

K. R. A. H.

ATTORNEY-GENERAL AND NEWTON ABBOT RURAL DISTRICT COUNCIL *v.* DYER.

EVERSHED J.

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May 7, 8, 9, 10, 13, 14, 15; *June* 5.

Highway — Footway — Dedication — Enjoyment "by the public as of "right and without interruption"—"Full period of twenty years" —"Full period of forty years"—Termini of periods of twenty years and forty years—Rights of Way Act, 1932 (22 & 23 *Geo.* 5, *c.* 45), *s.* 1, *sub-ss.* 2, 6; *s.* 2, *subs.* 1.

The defendant was the owner in fee simple of land bounded on the north by a railway track, on the south by a river. A lane ran from the main road to the track, under the railway bridge and across the defendant's land to the foreshore of the river. In 1832, that land was in strict settlement under the will of a testator who had died in that year. Certain maps showed that the defendant's property and the lane were constructed between 1833 and 1843. In 1877, the testator's son and grandson disentailed the property comprising what was later the defendant's land and conveyed it to such uses and on such trusts as they should by deed or will jointly appoint, or as the survivor should by deed or will appoint and subject thereto to uses corresponding to the uses of the settlement. The joint power was never exercised and in 1883 the son died. In 1914, a farm gate and, next to it, a wicket or kissing gate which could admit foot passengers, was built at the north end of the lane abutting on the main road. Previously there was, from the date at which the lane was made, a gate across the lane slightly more to the south than the gate of 1914 and a stile slightly away from the site of the kissing gate. Just before the northern gates were put up in 1914 a farm gate was put up at the southern end of the lane at a point between that end and the railway arch. No evidence was given, during the hearing of this action, that there had ever been next to that farm gate either a wicket gate for pedestrians or a stile. In 1920 the grandson appointed to C. the estate comprising the defendant's land and the lane, and also conveyed to C. the foreshore between the southern boundary of that land and the high water mark of the river at ordinary tides. In 1921, at an auction, the defendant bought the land from C., acquiring the soil of the lane between the railway arch and the high water mark of the river at ordinary tides. When the defendant went into occupation, the kissing gate was not locked and the public were using the lane to reach the foreshore. In 1923 the defendant's solicitor, having obtained a certain letter from the grandson, advised the defendant that the public had not a right of way over the lane. In 1924, the defendant locked the southern gate and put a "private" notice board where the lane joined the main road. In 1925, the council stated that it would seek to establish the right of way by proceedings, but went no further when the defendant agreed that the public should use the lane as a footway to the sea, which his solicitor confirmed by letter in February, 1926. In 1937, the defendant again locked the gate, unlocked it when he was reminded of the letter of February, 1926, and in 1941 put on a padlock and barbed wire which the council removed.

In an action by the Attorney-General on the relation of the council, and the council, for a declaration that there was a public right of footway along the lane across the defendant's land and for injunctions to restrain the defendant from locking the gate and interfering with the right of way :—

Held (1.) that the lane was enjoyed as a footway as of right and without interruption for over forty years immediately prior to the right being brought into question by the defendant in 1923 or 1924, and that there was no sufficient evidence that there was no intention to dedicate the way during that period :

Merstham Manor v. *Coulsdon and Purley Urban District Council* [1937] 2 K. B. 77 ; *Jones* v. *Bates* (1938) 158 L. T. 507 and *Hue* v. *Whiteley* [1929] 1 Ch. 440 considered :

(2.) That, by virtue of s. 1, sub-s. 6, of the Rights of Way Act, 1932, one or both of the termini of the periods of twenty years specified in sub-s. 1 and of forty years specified in sub-s. 2 of the section might be before the date of the coming into force of the Act, just as one or both of them might be after that date : and that the plaintiffs were therefore entitled to rely on the Act in respect of a period of upwards of forty years prior to the defendant's assertion in 1923 or 1924 of his right to exclude :

(3.) That, if the plaintiffs had had to rely on the alternative claim at common law which also was open to them, the court must have reached a conclusion adverse to them and could not have inferred dedication since, at common law, the question of dedication is one of proper inference of fact from evidence of user and is a question of the title during the relevant period: and during the relevant period in the present case the property was subject to strict settlement:

Farquhar v. *Newbury Rural District Council* [1908] 2 Ch. 586; [1909] 1 Ch. 12 considered.

WITNESS ACTION.

This was an action by the Attorney-General on the relation of Newton Abbot Rural District Council, and Newton Abbot Rural District Council. The defendant was the owner in fee simple of land called "Floor" in Bishopsteignton, bounded on the north by a track of the Great Western Railway Company and on the south by the Teign, and the plaintiffs claimed an injunction to restrain him from interfering with the user by the public of a footway called Floor Lane, running from the main road from Newton Abbot to Teignmouth down to the railway track in question and, after passing under the bridge carrying the track, running across the defendant's land to the foreshore of the Teign. Shortly before August, 1914, a farm gate and immediately next to it, a wicket gate or kissing gate capable of admitting foot passengers, were erected at the north end of Floor Lane where it abuts on the main road. Before these gates were erected there was, from the time when the road was made, a gate slightly further down the lane (i.e., to the south) than that farm gate and there was also at all times a stile for foot passengers at a point a little distant from the position of the kissing gate. In 1832 and 1833 a survey was made by order of the court. A map—sometimes referred to in this action as "Smith's plan"—forming part of this survey, and another map, which was part of a roll of plans deposited in 1844 by the predecessors in title of the Great Western Railway, showed that Floor and Floor Lane were constructed between 1833 and 1843. At the time of the survey of 1832 and 1833, the Lindridge Estates, which included Floor and Floor Lane, were in strict settlement under the will of the Reverend John Templer, who had died in November, 1832. His son, J. G. J. Templer, was thereunder tenant for life in possession and his grandson, Captain Templer, first tenant in tail male. In 1877 the tenant for life and Captain Templer, by a disentailing deed, conveyed the Lindridge estates to a trustee for uses, to such uses or on such trusts as they should by deed jointly appoint, or as the survivor should by deed or will appoint and subject thereto to uses corresponding to the uses of the settlement. The joint power was not exercised. In 1883 the tenant for life died. By deed dated November 10, 1920, Captain Templer—then tenant in tail in possession—appointed the Lindridge Estates to Sir Ernest (afterwards Lord) Cable, Floor being shown on the plan annexed under numbers 933, 937 and 940 and thereon called " Floor tenement " : and there was also conveyed to Lord Cable the foreshore between the southern boundary of Floor tenement and the high water mark at ordinary tides of the Teign to the south of Floor tenement.

In January, 1921, the defendant bought Floor from Lord Cable at a sale by auction, Floor being treated on the plan to the particulars as consisting of two items numbered 937 and 940, which appeared on that plan as clearly identifiable with the plots 933, 937 and 940 bought by Lord Cable. The defendant did not acquire any part of the foreshore. He became the owner of the soil of that part of Floor Lane lying between the railway arch and the high water mark at ordinary tides of the Teign, but not of any part of the soil of the lane north of the railway arch. Floor Lane being, however, the only means of access to Floor from Bishopsteignton, he obtained (if and so far as Floor was not a highway) a right of way of necessity over the northern part of Floor Lane from the main road to the railway arch. At the date of the conveyance to the defendant—March 23, 1921—Floor was occupied by George James, who and whose predecessors were all presumed to have occupied it as agricultural yearly tenants. On October 10, 1921, James moved out and the defendant moved in. At that date the farm gates at each end of Floor Lane were kept locked but the kissing gate was not locked and members of the public were using Floor Lane as a means of access on foot to the foreshore at the end of the defendant's property. He took strong exception to that user. In 1923 the defendant's solicitor obtained a letter from Captain Templer. In that letter Captain Templer wrote : " I know " nothing of any right of the Bishopsteignton Parish Council " to cross the Floor land for sand. I always understood that " I had no right to charge for sand. But the lane down to " Floor from the main road is a private road which I always " repaired, and there is a gate at the top which I used to keep " locked and anyone wanting sand had to get a ticket signed " by me. For these tickets I charged a small sum to help " the cost of keeping the road in repair. It is unknown to me

" that the Parish Council had any special privilege." The defendant's solicitor advised him that the public had no right of way over such part of Floor Lane as was on his land. In spring, 1924, the defendant put a " private " notice board at the north end of Floor Lane where it joins the main Teignmouth-Newton Abbot road. In November, 1925, the council stated that it proposed to bring proceedngs to establish the existence of a public right of way on foot over the lane.

On November 30, 1925, there was a meeting at Floor between the chairman, the clerk and the solicitor of the council on the one side and the defendant, his wife and his solicitor on the other. After discussion, the defendant consented to allow the public to use the way on foot only to the foreshore, preferring to unlock the existing southern gate to the erection of a wicket gate or stile next to it: and it was also stated by the council's solicitor or by the defendant's solicitor that the defendant's solicitor would in due course write a letter confirming the conclusion of the meeting and confirming the defendant's final decision with regard to the erection of a wicket gate or stile. Shortly afterwards the defendant unlocked the southern gate. On February 11, 1926, the defendant's solicitor wrote the confirmatory letter in these terms: " I am in receipt of your letter of yesterday's date and " observe. Inasmuch as my client has opened the gate leading " from the main road to the foreshore and removed the word " 'Private' from the wicket-gate, I considered he had done " all that was necessary. However, you may take this letter " as a formal intimation to the council that my client does not " dispute the right of way on foot only to the foreshore from " the main road by way of Floor Lane." The reference to the removal of the " Private " notice from the wicket gate (i.e., the wicket or kissing gate at the north terminus of the lane) was a mistake: the notice had in fact been on the farm gate. That letter was acknowledged on the next day, in these terms: " . . . . it was arranged . . . . that you " should write us a formal letter agreeing on behalf of your " client that there was a right of way for foot passengers to " the foreshore from the main road, and we think the matter " may now be considered settled."

Following that correspondence, the council abandoned its intention of bringing proceedings. The southern gate remained unlocked for eleven years. In April, 1937, the defendant put at the northern end of the lane a sign with the legend " private "drive—no parking" and again locked the gate at the southern end of the lane. On April 19, 1937, the clerk to the council wrote to him referring to the defendant's solicitor's letter of February 11, 1926, and shortly afterwards the defendant removed the notice and unlocked the gate. In 1941 he put on the gate a padlock and barbed wire, both of which, after due notice to him, the council removed at a cost of 14*s*., also placing at or near both ends of the lane notices advertising its public character as a footway. In about eighteen months those notices disappeared and the defendant locked the southern gate and put on and near it boards asserting his private property in the lane in the terms: "Beware "of the bull terrier" and "This land and foreshore is private "property—No loitering."

In 1941 the defendant changed from his solicitor, first to a firm in Exeter to whom, in October, 1941, the council sent a copy of the letter of February 11, 1926, written by his then solicitor and later to his solicitors in this action. The writ in this action was issued on May 28, 1943, and the plaintiffs claimed a declaration that there was a public right of footway in Bishopsteignton from the main Newton Abbot–Teignmouth road down to the foreshore along Floor Lane under the railway bridge and across Floor: an injunction restraining the defendant his servants and agents from locking the gate across Floor Lane lying immediately to the south of the bridge or permitting it to remain locked; and an injunction restraining the defendant his servants and agents from interfering with the user of the footway by members of the public by stating that there was no right of way over his land down to the foreshore or otherwise. The council claimed an order that the defendant pay to the council 14*s*. During the hearing of the action, the defendant asserted that his then solicitor had no authority to make any settlement on the defendant's behalf or to write any of the material letters which, before or after November 30, 1925, he did write. For the plaintiffs evidence was given by—omitting certain witnesses who were not material for purposes of the judgment in this action—fourteen witnesses on commission and thirteen at the trial of the action. Their evidence covered the period from 1855 to 1923 or 1924. It established that the lane was notoriously and substantially used over the whole period as a means of access to and from the foreshore at the southern end of the land to Bishopsteignton and vice versa as a landing or embarkation point by persons coming from or going to Teignmouth by boat, by persons crossing the river to and from Shaldon or Combe Cellars on the right bank, and by the crew of sand, clay and coal barges passing up river from Teignmouth before the days of power-driven barges; for boating for pleasure and for fishing expeditions and as a regular walk. Evidence with regard to permissive user for the carting of sand from the seashore to the village emphasized the character of the way itself as a roadway suitable for carts and leading directly, and between fences throughout its length, to the sea. For the defendant, who also gave evidence on his own behalf, three witnesses gave evidence on commission and two at the trial of the action. One of those two said that he had gone down the lane in 1920, expressed the opinion that the lane was a right of way as far as the southern gate and stated that the southern gate was locked. The other said that he and his comrades, as boys, had been forbidden by their schoolmaster to land at Flow Point (the southern terminus of the lane). The first of the witnesses examined on commission gave evidence of having found the gate locked when he went to cart sand, and of attempts by James, with the aid of a dog, to exclude the public from the lane. He said that the landing place was used for boating but that he thought that the boats belonged to James. The second witness was the son of a tenant named Yeoman and from the age of thirteen to that of seventeen or eighteen years had lived at Floor with his father. He gave evidence that his father had tried to stop the public using the lane and the foreshore. The third witness was the wife of the second witness.

Harman K.C. and *Geoffrey Cross* for the plaintiffs. There is a public right of footway from the main road to the foreshore over the lane, under the railway bridge and across the defendant's land. If people who wish to go along a particular way do, in fact, constantly and continually use it, that fact helps to establish evidence that it is a highway: *Eyre* v. *New Forest Highway Board* (1). That case is the locus classicus on the matter. In s. 1, sub-s. 1, of the Rights of Way Act, 1932 (2) the expression "as of right and without inter-

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(1) (1892) 56 J.P. 517.

(2) By s. 1, sub-s. 1 of the Rights of Way Act, 1932: "Where a "way . . . upon or over any land "has actually been enjoyed by the "public as of right and without "interruption for a full period of "twenty years, such way shall be "deemed to have been dedicated "as a highway unless there is

" ruption " means that there must have been user without any compulsion or secrecy and without licence: *Merstham*

" sufficient evidence to show that " there was no intention during " that period to dedicate such way, " or unless during such period of " twenty years there was not at " any time any person in " possession of such land capable " of dedicating such way."

By sub-s. 2: " Where any such " way has been enjoyed as afore- " said for a full period of forty " years, such way shall be deemed " conclusively to have been dedi- " cated as a highway unless there " is sufficient evidence that there " was no intention during such " period to dedicate such way."

By sub-s. 3: " A notice by the " owner of the land over which any " such way passes inconsistent with " the dedication of the way as a " highway, placed before or after " and maintained after the com- " mencement of this Act in such a " manner as to be visible to those " using the way, shall, in the " absence of proof of a contrary " intention, be sufficient evidence " to negative the intention to " dedicate such way as a highway, " and where a notice has been " placed in the manner provided " by this sub-section and is subse- " quently torn down or defaced, " notice in writing by the owner of " the land to the council of the " county and of the borough or " urban or rural district council in " which the way is situate that the " way is not dedicated to the " public shall, in the absence of " proof of a contrary intention, be " sufficient evidence to negative " the intention of the owner of the " land to dedicate such way as a " highway."

By sub-s. 5: " In the case of " land in the possession of a tenant " for a term or years or from year to " year or let on lease, any person " for the time being entitled in " reversion to the land shall, not- " withstanding the existence of " any such tenancy, have the " right to place and maintain such " notice as aforesaid, but so that " no injury is done thereby to the " business or occupation of the " tenant."

By sub-s. 6: " Each of the " respective periods of years men- " tioned in this section shall be " deemed and taken to be the " period next before the time when " the right of the public to use " a way shall have been brought " into question by notice as afore- " said or otherwise."

By s. 2, sub-s. 1: " Nothing in " this Act shall affect any pro- " ceedings pending at the com- " mencement of this Act, and where " in respect of any way a court of " competent jurisdiction decides " in proceedings so pending, or has " before the commencement of this " Act decided, that the way is not " a highway, this Act shall not " apply except as respects enjoy- " ment of the way after the date " of the decision."

By s. 4: " The person entitled " to the remainder or reversion " immediately expectant upon the " determination of a tenancy for " life or pour autre vie in land shall " have the like remedies by action " for trespass or an injunction to " prevent the acquisition by the " public of a right of way over " such land as if he were in pos- " session thereof."

By s. 6: " This Act shall come " into operation on the first day of " January, nineteen hundred and " thirty-four."

Manor, Ld. v. *Coulsdon and Purley Urban District Council* (1); *Jones* v. *Bates* (2). The plaintiffs need not show that there has not been any compulsion, secrecy or licence: if the defendant asserts that there has, he must prove it: see per Scott L.J. in *Jones* v. *Bates* (3). True, the defendant interrupted the user in 1924, 1937 and 1941 by putting up "private" notices, locking gates and having recourse to a padlock and to barbed wire. Those acts, however, amounted to no more than that interference with the enjoyment of the right of passage which alone can amount to interruption—see per Scott L.J. in *Jones* v. *Bates* (4)—and did not effectively assert, much less establish, his right to exclude the public. The evidence of the right of way goes back to 1855, thus including the period when Floor was occupied by James and by those tenants who preceded him. As the user has been for so long a time it must be assumed that J. G. J. Templer and Captain Templer knew of it, that Lord Cable also knew of it and that all three were therefore bound by it: *Davies* v. *Stephens* (5). Also, the lane is wide enough to admit vehicles—as in the case of those used for carting sand—and it must therefore include a way for pedestrians as well: *Davies* v. *Stephens* (5) and, although it was the defendant who locked the gates, it was not he who put them there. According to him his attitude is due to his wish to prevent his pigs from straying and it may well be that it was to prevent animals from straying that the gates were put up. It does not necessarily follow, however, that there is not a right of way: *Davies* v. *Stephens* (5). It is clear that Floor Lane has been enjoyed as a footway, as of right and without interruption, certainly for twenty years before the defendant tried to exclude the public. Neither that period of twenty years nor the period of forty years mentioned in s. 1, sub-s. 1, need come to an end after the Act came into force, on January 1, 1934. That is clear from s. 2, sub-s. 1. That sub-section provides that the Act is not to affect proceedings pending at its commencement—i.e., on January 1, 1934—and that, where a court decides in proceedings so pending or has decided before that date that the way is not a highway, the Act is not to apply. That can mean only that the periods of forty and twenty years may, in the case of decision before the coming into force of the Act and must, in the case of decisions after it, end at a date later than January 1, 1934, if it were correct that they must in every case end after that date the sub-section would be unnecessary. There has so far been no decision on the question which is now before the court and therefore it is open to the plaintiffs to prove the requisite period which it is submitted they have done. The defendant himself at one time took the view that they had done so, as is shown by the agreement effected between him and the council by the seven letters which passed between his solicitor, Mr. Scott and Messrs. Michelmore & Co. As those letters effected that agreement the court is entitled to read them, notwithstanding that they were written "without prejudice": see per Lindley L.J. in *Walker* v. *Wilsher* (1). The meeting of November 30, 1925 and the letters written before and after it are very important for the plaintiffs' case: for at that meeting the defendant definitely agreed that the public should be allowed to use the lane as a footway to the foreshore. That agreement, and the subsequent confirmatory letter, constitute a contract which can be enforced against him, or even amount to a formal dedication by him of that part of the lane which is on his land. If, therefore, the evidence of user as of right and without interruption is not sufficient to establish the existence of a right of way irrespective of anything done or not done by the defendant—and it is submitted that it is sufficient so to establish it—the conduct of the defendant himself has created it. Accordingly, the plaintiffs claim, on the facts, the appropriate relief, as having satisfied s. 1, sub-s. 2, of the Rights of Way Act, 1932. Alternatively, there is also a claim at common law open to them. True, Floor and the lane—Floor Lane—were not constructed until 1832 at the very earliest: and from 1832 to 1877—the year in which the disentailing deed was executed—there was no-one who could dedicate the lane as a public highway. It follows, therefore, that the court cannot infer a dedication before 1832, the earliest date at which the state of the title was known. None the less, Mr. J. G. J. Templer, the first tenant for life, and his grandson, Captain Templer, the first tenant in tail male, could have dedicated it. They could have done so together until 1883 and from that date Captain Templer by himself could have done so until he appointed to Lord Cable in 1920. The court can, therefore, infer that there was a capacity to dedicate and ought so to infer: and the dedication proper to be inferred is of the whole of the lane down to the foreshore: cf. per Phillimore J. in *Tyne Improvement Commissioners* v. *Imrie and others* (1). The sea is a sufficient terminus ad quem: *Williams Ellis* v. *Cobb* (2). Since 1855 the lane has been used to go to and from the foreshore for recreational boating, fishing and even just walking and it is used for other purposes too: but even if it was not, and was used only for pleasure and recreation, still the court could infer dedication: *Hue* v. *Whiteley* (3), and to that end the court can properly use the fiction of a lost deed. True, it could not use that fiction in most cases where the property was in strict settlement, for, up to 1925, a disentailing assurance had to be enrolled. Therefore, whenever a disentailing assurance was executed for the purpose of effecting a dedication, there was never any question of the deed by which dedication was effected being lost. It is submitted, however, that the court can use the fiction of a lost grant in the present case: for there is here an over-riding power of appointment; and, because of the presence of that over-riding power, it would have been possible for an appointment to be made without the enrolment of any deed. Therefore, although there was no other appointment save that by Captain Templer, the court can properly infer that at some time or other there was a dedication of the lane by a deed or deeds which have now been lost.

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(1) [1937] 2 K. B. 77.

(2) (1938) 2 All E. R. 237; 158 L. T. 507.

(3) (1938) All E. R. 237, 245; 158 L. T. 507, 511.

(4) (1938) 2 All E. R. 237, 246; 158 L. T. 507, 511.

(5) (1836) 7 C. & P. 570.

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(1) [1889] 23 Q. B. D. 335, 337.

Jennings K.C. and *Rose* for the defendant. On the form of the pleadings it is not open to the plaintiffs to invoke the Rights of Way Act, 1932. True, it is alleged in para. 3 of the statement of claim that there has been at all times throughout living memory a public right of footway from the main road to the foreshore. That, however, is an allegation in the most general terms and it has not been proved by the evidence. The rest of the claim is founded on allegations of what the defendant has done or has not done since he acquired the property and it is on those allegations, and not the Act, that the plaintiffs must rely. Even if, however, the plaintiffs were entitled to rely on the Act, there would have to be put on it a construction very different from that for which the plaintiffs contend. Section 1, sub-s. 1, prescribes enjoyment as of right and without interruption for a full period of twenty, sub-s. 2 for a full period of forty, years. In each case the period may begin before January 1, 1934, the date on which the Act came into force—but in each case it must end after that date. Were it otherwise, the Act could cover any such period no matter how long ago that period began, even—to take an example showing how absurd the result would be—a hundred years. That cannot have been the intention of the Legislature and it would not be proper so to interpret the Act. Sub-section 3 shows that an owner can, by displaying notice as therein prescribed, protect himself against a presumption of dedication and sub-s. 5 and s. 4 show that the Act sets out to protect the interests of tenants, remaindermen and reversioners. The legislature has deliberately given them a chance of having recourse to these means of protecting themselves by expressly providing that the Act, which was passed on July 12, 1932, should not come into force until some eighteen months later, on January 1, 1934. If, therefore, the period of twenty or forty years could end before January 1, 1934, the situation in cases in which it did so end would be that the right of way would be an established fact and a person who might have had a good case against his interests being adversely affected could do nothing about it, just because that period during which he was intended to do what he could to protect himself had been avoided or stopped short of, so to speak, by the effect of the very Act which brought it into being. It cannot have been intended that the Act should be retrospective, at any rate to that extent: *Marsh* v. *Higgins* (1): *Waugh* v. *Middleton* (2). Thus, the provision in s. 1, sub-s. 6, that the periods of twenty and forty years are to be the periods " next before the time when the right of " the public to use the way shall have been brought into " question by notice as aforesaid or otherwise " cannot mean that those adversely affected are to be deprived of the period of eighteen months. The phrase " shall have been " in the sub-section cannot have been intended to have that effect. True, there is an air of finality about the future perfect tense: but in *Marsh* v. *Higgins* (1) Alderson B. said that it would be monstrous to deprive of his right of action a plaintiff who had not assented to a deed of arrangement executed before the coming into force of the Bankruptcy Act, 1849, when he could not possibly have obtained the protection which the debtor's

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(1) (1899) 81 L. T. 174, 179.
(2) [1935] 1 K. B. 310.
(3) [1929] 1 Ch. 440.

(1) (1850) 9 C. B. 551.

(2) (1853) 22 L. J. (Ex.) 109.

executing the deed gave to the non-assenting creditors as a consideration why it should bind them: and in *In re Williams* (1) Buckley L.J. made it clear that the word " shall " may be expressive of futurity, of condition apart from futurity, or of obligation apart from futurity or condition. In the present case the parallel to *Marsh* v. *Higgins* (2) is exact. The plaintiffs ought not to be deprived of their right to avail themselves of the period of eighteen months in which to establish the right of way. It must of course follow from that that s. 2, sub-s. 1, is redundant: for, if the periods of twenty and forty years must in every case come to an end after the date of the commencement of the Act—in order that the eighteen months' period from the date of its being passed to the date of its coming into force may be available to those who wish to make use of it—it is not, or ought not to be, necessary to point out that they will come to an end after that date in certain circumstances: it is therefore to be inferred that the subsection was included in the Act ex abundanti cautela and merely makes explicit what would be implicit in the Act if the subsection was not there. If there has been user as of right and without interruption, whether it be from 1855, 1877, or any other date, it is for the plaintiffs to show it. So far, however, from their having been able to show that, what the evidence has shown conclusively is that some of the tenants of Floor did their utmost to stop the public from using the lane. True, from about 1880 to about 1890, some members of the public used the lane freely. Those persons, however, knew the tenants for the time being either as friends or as business associates, from which the court ought to infer that their user of the lane was not as of right but derived from the tolerance of the tenant in question: *Merstham Manor Ld.* v. *Coulsdon and Purley Urban District Council* (3): *Jones* v. *Bates* (4); *Hue* v. *Whiteley* (5); *Folkestone Corporation* v. *Brockman* (6). On his contention that the plaintiffs cannot invoke the Act but must rest on their allegations against him, the defendant admits neither the correctness of their version of the facts of the meeting of November 30, 1925, and of the correspondence which preceded and followed it, nor the authority of Mr. Scott to conclude the settlement which he is alleged to have concluded. Again on the pleading as they stand, the plaintiffs cannot be heard to say that the defendant has bound himself by a contract: and even if he has done so, it is inappropriate to describe anything that he has done as "dedication": a way, to be dedicated, must have a terminus: and what is on his land could not be dedicated separately from what is not on it; for the railway arch, which divides them, is not a proper terminus. No claim based on contract is made out by the statement of claim. Moreover, if such a claim was or was sought to be made out, the Attorney-General neither would have to be nor properly could be a party to the action.

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(1) [1914] 2 Ch. 61.
(2) (1850) 9 C. B. 551.
(3) [1937] 2 K. B. 77.
(4) (1938) 2 All E. R. 237; 158 L. T. 507.
(5) [1929] 1 Ch. 440.
(6) [1914] A. C. 338.

Harman K.C. in reply. The contention that the end of the period of twenty years and of the period of forty years must both be after the date of the coming into force of the Act is unsound. All that the Act sets out to do is to make it easier than it was before the passing of the Act to establish a right of way and, on the other hand, to protect certain classes of persons against trespass. This latter object may be fulfilled to some extent by the giving of the period of eighteen months: but the utmost that can be said in support of the argument which has been put forward on behalf of the defendant is that if the period of 20 or 40 years runs out before January 1, 1934, the interests of those persons may be adversely affected: it does not follow that they must be. [He referred to *The Idun* (1).] With regard to the proof of user as of right and without interruption, the plaintiffs have abundantly proved their case. They need not state either how or when the lane became a highway, much less allege that it has been one from time immemorial: see *Aspindall* v. *Brown* (2) per curiam, referred to in Pratt on Highways, 18th ed., at p. 10.

Cur. adv. vult.

June 5. EVERSHED J. reading a judgment, said: In the month of November, 1925, the council made it clear that they proposed to bring proceedings for the purpose of establishing if they could the existence of a public right of way on foot over the lane, and on November 16, Mr. Scott called upon Messrs. Michelmore & Company, who were also the solicitors for the council, to discuss the matter at issue. There followed a series of seven letters, four from Michelmore & Company to Scott,

(1) [1899] P. 236.

(2) (1789) 3 T. R. 265.

three from Scott to Michelmore & Company, all expressed or intended to be "without prejudice." Mr. Harman claimed to be entitled to read these letters according to the principle stated, for example, by Lindley L.J. in the case of *Walker* v. *Wilsher* (1). on the ground that they resulted in an agreement between the relator plaintiffs and the defendant settling the matter in issue between them. I read them de bene esse, and, in my judgment, in the light of the later evidence, Mr. Harman's contention as to the effect of the letters was (subject to the question of Mr. Scott's authority to which I shall presently refer) well founded and rendered them admissible in evidence. [His Lordship then referred to the letters, to the meeting of November 30, 1925, and to the facts up to the date of the issue of the writ in the action. His Lordship then continued as follows :] On this state of facts a short question arises whether the plaintiffs are or the second plaintiff is not entitled to obtain the substance of the relief which is claimed, namely, an injunction to restrain the defendant from obstructing or interfering with the use of the lane by the public as a footway upon the simple ground of contract. Mr. Jennings, for the defendant, argued that on the form of the pleadings it was not in any case open to the plaintiffs or either of them to base their case on contract and that for such a case the Attorney-General was not in any event a necessary or proper party. It is true that the plaintiffs' pleadings, even after amendments allowed by me during the trial, do not in terms plead the alleged wrongful acts of the defendant as constituting breaches of contract, nor is the prayer for an injunction qualified by reference to an alleged contract. Equally, in my judgment, the Attorney-General would not prima facie be a necessary or proper party to a claim arising ex contractu. On the other hand, all the facts material to such a claim are properly pleaded, and in opening the case Mr. Harman made it clear that he would rely upon the transactions of November 30, 1925, and on the letters which preceded and followed those transactions either as constituting an enforceable contract or as constituting a formal dedication by the defendant of the southern part of Floor Lane, or both. In my judgment, it would not be right to exclude the relator plaintiffs from obtaining relief on the basis of contract, if contract there was, nor do I think any injustice to the defendant can, in the circumstances, be said to be thereby involved. As regards the alternative submission that, at the meeting and in Mr. Scott's letters on his behalf, the defendant effectually dedicated that part of the lane which was on his land and, therefore, in his power to dedicate, the objection was taken that the division of the lane into sectors, one north and one south of the railway arch, leaves each sector without an appropriate terminus and so, by itself, incapable of dedication. The objection is, in my judgment, formidable and I am not satisfied that in the eyes of the law dedication of sectors of a way independently and not contemporaneously is possible.

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(1) 23 Q. B. D. 335, 337.

But as I have already intimated, it seems to me that on November 30, 1925, a bargain was made for valuable consideration and that such bargain was confirmed by the two letters of February 11 and 12, 1926. Beyond doubt the representatives of the council on the one hand and the defendant and his wife and solicitor on the other hand met on that November 30, with a view to settling the council's claim to the establishment and recognition of a public right of footway. Whether in the year 1925 the council had a good case in law, they clearly thought and thought in my judgment bona fide that they had, and they intended forthwith to litigate their claim, for which purpose they had made preparations. The abandonment of that claim or the promise to abandon it was, in my view, a good consideration for the defendant's concession of the right of the public to use the lane on foot, he to decide whether a wicket gate or stile should be erected near to the existing southern gate (the cost of which the council had in fact expressed themselves willing to pay in whole or in part) or the existing gate should be left unlocked. In terms, the defendant's concession was an admission of the public right of way on foot only. He " does not dispute the right of way on foot only " (see the letter of February 11, 1926) : but such concession, in my view, necessarily involved the promise on the defendant's part made to the council not to obstruct or interfere with such public use, a promise which was made for good consideration and of which he is plainly now in breach.

[His Lordship then held that from November, 1925, to February, 1926, Mr. Scott had the full authority of the defendant for all the steps he took on his behalf. His Lordship then continued as follows :]

I wish to add that, as it seems to me, the important and salutary rule as to professional privilege must involve as a complement that a man who employs a solicitor to represent him must be taken to clothe his solicitor with an authority which is not lightly to be repudiated. In the present case the defendant by his counsel waived all privilege and thus enabled me to have the advantage of hearing the solicitor's own account of what had transpired. But the defendant was not bound to waive the privilege, nor, had he declined to do so, could he have been adversely commented upon on that account. It seems to me that if a client is entitled, without imputing to his solicitor any conscious betrayal of his interests, to avoid the consequences of a bargain made by his solicitor on his behalf by simply alleging that the solicitor had in fact no authority to write a particular letter, those who deal in good faith with or through solicitors will be liable to be put at the gravest disadvantage and the result might well be to render impossible the maintenance of the existing rules of professional privilege—to the serious detriment of the administration of justice. If in such circumstances the solicitor has exceeded his authority, the client's remedy is prima facie against the solicitor.

If I am right so far, my conclusion would be sufficient to establish the right of the council to relief in the action which would be practically effective. But, in the circumstances, it is also clearly necessary for me to express my view on the main issue in dispute, namely, whether, apart from the defendant's admission or agreement in 1925, a public right of way on foot has been shown to exist over Floor Lane. I have already stated the facts as I find them in regard to the making of the road in the first instance. The termini of the way are, at the northern end, the public highway, that is, the main Teignmouth–Newton Abbot Road, and, at the southern end, the foreshore, that is the sea. It must now be taken as clearly settled not to be a requisite of a public right of way that it must lead from one public highway to another. Thus there may be a public right of way to a view point or beauty spot. For some purposes—for example, the so-called public rights of navigation or fishing—the sea may be regarded as a highway, but, apart from such consideration, the high water mark of the sea at ordinary tides may, I conceive, be a good terminus for a public right of footway even though its proved use were confined to walking to the sea's margin and thence returning. See, for example, *Williams-Ellis* v. *Cobb* (1) especially the judgment of Lord Wright, where reference is made, among others, to the judgment of Wills J. in *Eyre* v. *New Forest Highway Board* (2) and of Phillimore J. in *Tyne*

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(1) [1935] 1 K. B. 310.

(2) 56 J. P. 517.

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Improvement Commissioners v. *Imrie and Others* (1). Where a way leads to the sea questions may arise, as pointed out by Lord Wright, of the rights of the public, if any, to obtain access to the sea, when not over the foreshore, for example for the purposes of embarkation. In the present case the foreshore was, as I have already explained, acquired by Lord Cable in 1920 from Captain Templer as freehold tenant of the Lindridge Estates. In these circumstances, it has been naturally and properly argued on the part of the defendant that evidence of the user of Floor Lane by persons on their way to a walk over, or a picnic upon, the foreshore, cannot be regarded as evidence of user as a public right ; since in regard to their activities on the shore such persons can at best have been licensees of the owner or exercising some customary privilege confined to the inhabitants of Bishopsteignton. If there were no evidence of user save in relation to such privileges upon the foreshore the objection might well be substantial. But, in my judgment, where, as presently appears, there is a body of evidence of user of the way strictly as a public way, it is legitimate to add and to rely upon evidence of user in connexion with the privilege mentioned either on the ground that in the circumstances the court is not concerned with the ultimate purpose of the member of the public after he has passed along the way or on the ground that the privileged class of licensees or local inhabitants are also members of the public and pass along the way in their latter character. As regards the matter of motive, the case is, in my view, wholly distinct from the case of user of the way not as a way at all, not as a means of access to some terminus, but for some purpose in no way connected with a right of passage, for example, to spy upon the activities of persons whose property abut on the way as in the well-known case of *Hickman* v. *Maisey* (2).

[After considering the evidence his Lordship continued as follows :] On this state of the evidence it was argued for the defendant that the plaintiffs had nevertheless failed to discharge the onus laid upon them of establishing user by members of the public over the period of time covered by the evidence without interruption and as of right. Emphasis was laid on the evidence given, slender though it was, of attempts made by former tenants of Floor to exclude the public. Emphasis was also laid on the circumstances that many of the witnesses who had testified on the plaintiffs' side that, in their cases, no impediment had been put in the way of their use of the lane, admitted to having been on friendly or business terms with the several tenants and it was urged accordingly that the proper inference to be drawn was that their use of the lane should be attributed to the tolerance of the tenant. The second argument was, it was said, especially pertinent to the period from about 1880 to 1890, which is of particular importance in relation to the application of the Rights of Way Act, 1932, to which I must presently refer.

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(1) 81 L. T. 174.

(2) [1900] 1 Q. B. 752.

In considering the significance of the formulæ "without "interruption" and "as of right" I have in mind the recent judgment of Hilbery J. in *Merstham Manor* v. *Coulsdon and Purley Urban District Council* (1) and of the Court of Appeal in *Jones* v. *Bates* (2) and Tomlin J.'s definition in *Hue* v. *Whiteley* (3) of the phrase "as of right" as meaning "believing "themselves to be exercising a public right to pass from one "highway to another." Mr. Jennings referred also to the speeches in the House of Lords in the case of *Folkestone Corporation* v. *Brockman* (4). As regards the second of the two formulæ, there is, as it seems to me, no rule or principle which requires me to attribute the user to tolerance if it is possible so to do. And were it so, in actions of this nature the plaintiffs would almost inevitably be placed in the dilemma of having to concede either tolerance or interruption. The true view seems to me to be that the matter is one of the proper inference to be drawn from all the proved facts of the case including the character of the way itself and the evidence given as to the state of mind of the users of the way as well as the circumstances and title of those whose right or interest it might be to allow or prevent the public privilege. In the present case the plaintiffs' witnesses appear to me beyond doubt to have satisfied the condition expressed by Tomlin J. And I attach, as has already appeared, considerable weight to the character of the way itself with its practical advantages over the alternative field route by Luxton Steps and its apparent continuation north of the Teignmouth-Newton Abbot main road. It is no doubt true, particularly in a relatively small community such as Bishopsteignton, that, in the early stages at least, the toleration and neighbourliness of the early tenants contributed substantially to the extent

(1) [1937] 2 K. B. 77.
(2) 158 L. T. 507.
(3) [1929] 1 Ch. 440, 445.
(4) [1914] A. C. 338.

and manner of the use of the lane. But many public footpaths must be no less indebted in their origin to similar circumstances, and if there is any truth in the view (as stated by Chief Justice Cardozo) that property like other social institutions has a social function to fulfil, it may be no bad thing that the good nature of earlier generations should have a permanent memorial. As regards interruption, I am unable to accept the suggestions of the defendant's witnesses in face of the substantial and convincing body of evidence adduced by the plaintiffs. [After further considering the evidence, his Lordship continued as follows:] On the evidence, therefore, I find that Floor Lane was enjoyed as a footway between the Teignmouth-Newton Abbot main road and the sea as of right and without interruption for a period of over forty years immediately prior to the right being brought into question by the defendant in 1923 or 1924, and I also find that there is no sufficient evidence that there was no intention to dedicate the way during that period. As regards the last point, I have already indicated my view that Captain Templer's letter of 1923, assuming it to be admissible (Captain Templer being, as I was told, now dead) is of no real weight as evidence relating to a footway. So far as intention is concerned, my inclination is the other way when I pay regard to the nature and characteristics of the road and the evidence (including the pencil markings) on Smith's plan of 1832–1833 and the Great Western Railway Company's plans.

On this state of facts the plaintiffs claim the appropriate relief as having satisfied the requirements of s. 1, sub-s. 2, of the Rights of Way Act, 1932. To Mr. Jennings' objection that it is not open to the plaintiffs upon their pleadings to invoke the Act, my answer is that the plaintiffs are not bound to plead it. But Mr. Jennings has also raised a second point of some nicety on this aspect of the claim. The period of forty years covered by the plaintiffs' case ends and must, within the terms of s. 1, sub-s. 6, of the Act, end with the time when the defendant first brought the right of the public to use the way into question in 1923 or 1924, that is to say nearly ten years before the date when the Act came into operation on January 1, 1934. Mr. Jennings concedes that the periods of forty or twenty years specified in the first section of the Act may start at a time anterior to its coming into force but contends that upon the construction of the Act such periods must end on a date later than January 1, 1934. Any other view would, says he, make the Act retrospective or retrospective to an extent greater than would be justified by the true canons of interpretation of statutes. Having regard to the lapse of time since the coming into force of the Act, the point may not be of far-reaching importance, but since it is of some public interest I feel bound to deal with it fully.

The language of s. 1, sub-ss. 2 and 6, of the Act, material to the present issue, is as follows: by sub-s. 2: "Where "any such way has been enjoyed as aforesaid" (that is, as of right and without interruption) "for a full period of forty "years, such way shall be deemed conclusively to have been "dedicated as a highway, unless" etc.; and by sub-s. 6, the period of forty years "shall be deemed and taken to be the "period next before the time when the right of the public to "use the way shall have been brought into question by notice "as aforesaid or otherwise."

The reference to notice is a reference to sub-s. 3 of the same section, providing that a notice inconsistent with dedication placed before or after and maintained after January 1, 1934, shall, in the absence of proof to the contrary, be sufficient to negative any intention to dedicate.

As I construe them, the words which I have quoted from sub-ss. 1 and 6 would, taken by themselves, appear to cover the case of a period of forty years both termini of which were earlier than the date of commencement of the Act. But Mr. Jennings, in support of his contention that, since the effect of the Act would otherwise adversely affect the vested interests of landowners, no greater retrospective effect should be given to it than its language necessarily demands, draws attention to certain other of its provisions. The provisions as to notice are clearly intended, as he argues, to give to the landowner a means of protection against the presumption of dedication. Further, the provisions of s. 1, sub-s. 5, giving express power to a reversioner to maintain such notices notwithstanding the terms of the lease or tenancy, and the provisions of s. 4, whereby remaindermen have the right to protect themselves by proceedings for injunction as if they were in possession of the land over which the alleged rights of way run, are likewise intended to give means of self-protection to persons whose rights would otherwise be adversely affected by the Act. Finally, Mr. Jennings points to the interval between the passing of the Act (namely July 12, 1932) and its coming into effect (namely, January 1, 1934). In the light of

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these considerations he claims that it would be contrary to the proper principles of construction so to interpret the Act as adversely to affect existing rights by applying it to periods terminating before its coming into operation and therefore before the landowners could take the measures for self-protection the opportunity for which the interval between the passing of the Act and its coming into operation must be treated as specially designed to give.

In support of this argument reference was made to two cases, namely, *Marsh* v. *Higgins* (1) and *Waugh* v. *Middleton* (2), decided upon the question of the extent of the retrospective effect of the Bankruptcy Act, 1849, and particularly of ss. 224 and 225 of that Act, relating to deeds of arrangement and their binding effect on non-assenting creditors. In the first case it was held that the section did not operate to deprive a creditor of his vested rights in an action commenced prior to the coming into operation of the Act notwithstanding that a deed had been in fact executed (before the commencement of the action) which answered the description of a deed of arrangement within s. 224 of the Act—the use (inter alia) in the sections of the future perfect tense not being regarded as importing retrospective effect having regard to the use of the same terms elsewhere in the same sections in a sense which could not have been intended as retrospective. In the second case the matter was carried a step further since in that case the defendant had not already started proceedings when the Act came into operation. It was held that, notwithstanding the use of the word " now," the plaintiff was not debarred from prosecuting his claim on the ground (as pointed out by Alderson B.) that it would be monstrous to deprive the plaintiff who had not assented to the pre-Act deed of his right of action when by no possibility could he have obtained the protection which the act of bankruptcy (that is, the execution of the deed by the debtor), gave to the non-assenting creditors as a consideration why they should be bound by it.

The argument is formidable, but I have reached a conclusion adverse to it. In the first place, it is to be borne in mind that the Act of 1932 is substantially a procedural Act, in the sense that it is designed, not to create new rights or new causes of action, but rather to simplify and render more easy the means of making good claims of a well established kind. In so far as the statute may properly be described as procedural,

(1) 9 C. B. 551.

(2) 22 L. J. (Ex.) 109.

the rule against giving to it retrospective effect has no application (see, for example, Maxwell on the Interpretation of Statutes, 8th ed., p. 199). It is no doubt true that vested rights may in a sense be thereby affected, but this is likely to be true, incidentally, of any so-called procedural Act—for example, the Public Authorities Protection Act, 1893, which, though barring altogether a cause of action after the specified interval of time, was held nevertheless to apply in an action started before the Act came into operation : (see the *Ydun* (1)). In this connexion the Rights of Way Act, 1932, is in my judgment distinguishable from the provisions of the Bankruptcy Act, 1894, the subject of the two cases above cited, which created altogether new rights and obligations for the first time. True it may be that the provisions of the Act of 1932 relied on by Mr. Jennings give a measure of protection to landlords of which they may be deprived in the case of a period which has expired before January 1, 1934, but the effect of these provisions is not conclusive one way or another and in every case the question of fact will remain whether in all the circumstances an intention to dedicate is or is not to be inferred.

And apart from these general considerations there are, in my judgment, other provisions in the Act pointing against the defendant's view. In the first place, the reference in sub-s. 6 to " notice as aforesaid " appears necessarily to contemplate a case in which the alleged public right has been brought into question before the operation of the Act, that is, by a notice erected before that date and since maintained. Nor in that sub-section is there any context (such as appeared in the case of *Marsh* v. *Higgins* (2)) necessarily limiting the sense of the future perfect " shall have been." But as a stronger indication Mr. Harman relied upon the terms of s. 2, sub-s. 1, providing in effect that nothing in the Act should affect any pending proceedings and that where a court of competent jurisdiction in such proceedings decides or in earlier proceedings has decided against the existence of the alleged right of way, the Act should not apply save in relation to enjoyment of the way after the date of the decision. If the argument for the defendant is well founded, the whole of this sub-section would appear to be otiose or at best declaratory only, and Mr. Jennings and Mr. Hubert Rose were constrained to admit that it must be taken to have been inserted ex abundanti cautela.

I ought not, in my view, to give to a whole sub-section of this

(1) [1899] P. 236.

(2) 9 C. B. 551.

short Act so negative an effect, unless I am compelled so to do, and in my judgment I am not so compelled. In my judgment, the true interpretation of the Act is that by virtue of s. 1, sub-s. 6, one or both of the termini of the periods specified in sub-ss. 1 and 2 may be before, as one or both may be after, the date of the Act's commencement, subject to the important reservation contained in s. 2, sub-s. 1, namely, that the Act may not be relied upon in proceedings pending on January 1, 1934 (proceedings in which necessarily the use of the alleged way must have been brought into question before that date): nor is the Act available, for example, upon an appeal to disturb a judgment by a court of competent jurisdiction pronouncing against the existence of a highway in any such pending or in earlier proceedings.

I should refer to a further argument on the part of Mr. Jennings, namely, that, if the view contended for by Mr. Harman is correct, then the end of the period relied on might in theory be on a date however remote before the commencement of the Act—might for example, be not in 1924 but in 1824. This argument is surely over-fanciful. If one can sensibly assume a case in which the alleged right has been more or less continuously in dispute for over one hundred years without its having been litigated, it is difficult to see how the claimants could prove actual enjoyment as of right and without interruption for a full period which would have ended about a quarter of a century before the birth of the oldest possible local inhabitant.

In the result, therefore, I hold that the plaintiffs are entitled to rely upon the Act of 1932 in respect of a period of upwards of forty years prior to the defendant's assertion of his right to exclude in 1923 or 1924, and that they have satisfied all the requirements of s. 1, sub-s. 2, of the Act in regard to such period.

If this conclusion is right, the plaintiffs need not rely upon their alternative claim under common law which is admittedly also open to them. But since the matter has been carefully and fully argued it is perhaps right that I should briefly express my view upon it.

It is well settled that at common law the question of dedication is one of fact which may properly be inferred from evidence of user, provided that the court may also find as facts both intention and capacity to dedicate on the part of some person or persons in respect of the land over which the alleged way passes. I need not repeat what I have already said in regard to intention. The difficulty arises in reference to capacity. The case is somewhat unusual in this respect, that on the one hand it is clear on the evidence that the way did not come into existence at all until after 1832 and that, on the other hand, there was admittedly no one capable of dedicating from 1832 to 1877, so that it is not open to the court in this case (as is not infrequently done in cases where the relevant land is and has long been in strict settlement) to infer a dedication at some date, however remote, prior to the earliest time when the title to the land is known. The question turns, therefore, on whether I can properly infer dedication at any time between 1877 and the purchase by the defendant in 1921, bearing in mind that, under the terms of the disentailing deed of 1877, the life tenant and Captain Templer jointly until 1883 and thereafter, until the sale by him in 1920, Captain Templer alone, had power to appoint the land as they or he pleased. Mr. Harman's argument—which to my mind has at least a strong appeal to common sense—is that the life tenant and Captain Templer had between them during the whole of the relevant period down to 1920 such a dominion over the land that capacity to dedicate can and should be inferred; and Mr. Harman contends that resort can and should be had for the purpose to the well-worn fiction of a lost deed or lost deeds. In this respect a valid distinction may, it is said, be made between the facts of the title in the present case and cases where the land is strictly settled without any overriding power of appointment; for though in the latter the tenant in tail and the life tenant (if any) might disentail for the purpose of dedication, the requirement as to enrolment up to 1925 must negative any presumption of lost deeds. But, notwithstanding the attractions of the argument, I am not satisfied, as I read, for example, the judgment of Warrington J. and the Court of Appeal in the case of *Farquhar* v. *Newbury Rural District Council* (1) that the argument does justice to the basis on which a finding of capacity may be held to rest. As I follow the judgment which I have mentioned—and I refer particularly to the judgment of Farwell L.J. in the Court of Appeal—the question is one of the title in fact during the relevant period. And, prima facie at any rate on the evidence, the state of the title was throughout the period that the property remained subject to strict settlement. Nor am I satisfied that on the facts there would be any warrant to justify a presumption of

(1) [1908] 2 Ch. 586; [1909] 1 Ch. 12, 18.

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lost deeds. The conveyance to Lord Cable recites that there was no exercise of the joint power of appointment and is expressed to be by virtue of the sole power vested in the vendor by the disentailing deed though also of all other powers, if any, him enabling. Moreover, on the attached plan the brown colouring (whatever its significance) of Floor Lane does not extend south of the railway arch, the southern part of the lane being shown as part of Floor tenement. I do not forget that for a short period Lord Cable was absolute owner of the property. But as regards Lord Cable, I am impressed with the difficulty of inferring dedication by him as a fact in face of the form of the auction particulars and the retention on the plan attached to the conveyance to the defendant of the colouring of the lane as part of the tenement.

For the reasons I have given, therefore, my conclusion would be adverse to the Plaintiffs in so far as they had to rely on the common law. I should add that I must not be taken to be expressing any view on the meaning of the words " capable of dedicating " in s. 1, sub-s. 1, of the Act of 1932.

The conclusion of the whole matter is that the plaintiffs are, in my judgment, entitled to the declaration and injunction for which they ask. The council is entitled also to recover, if it so requires, the sum of 14*s.* which was admitted to represent the fair cost of removing in 1941 the padlock and barbed wire, wrongly, as I hold, placed and maintained by the defendant upon the southern gate. The plaintiffs are also entitled to their costs of the action.

Solicitors : *Smith and Hudson, for Harold Michelmore & Co., Newton Abbot ; Pyke, Franklin & Gould, for Kitsons, Hutchings, Easterbrook & Co., Torquay.*

K. R. A. H.

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May 21, 22, 23, 24, 28, 29, 30 ; *July* 10, 25.

NEWCASTLE-UNDER-LYME CORPORATION *v.* WOLSTANTON, LIMITED.

Mines—Subsidence of surface due to underground workings—Damage to gas mains and pipes under roads—Loss of gas—Corporation's right of support for sanitary works—Occupation under licence—Reasonable and proper working—Nuisance—Statutory rights of support—Waterworks Clauses Act, 1847 (10 & 11 *Vict., c.* 17), *ss.* 18 *to* 27*—Public Health Act,* 1875 (*Support of Sewers*) *Amendment Act,* 1883 (46 & 47 *Vict., c.* 37), *ss.* 4, 5.

The gas mains and pipes laid under streets by a borough corporation, or their predecessors in title, were seriously damaged from time to time between 1934 and 1942 by the workings of a coal and ironstone mine in the area and a considerable loss of gas resulted. The surface land in which the pipes had been laid had been severed from the subjacent minerals long before the laying of any pipes, and had at all material times an unqualified right of support from the subjacent minerals. Workings since 1942 having been regulated by an order of the Court of Railway and Canal Commission, the corporation sued the mine-owners for damages down to that date. The corporation had not made any survey or maps of its gas mains or other sanitary works as required by the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, and could therefore not enforce its rights under that Act :—

Held (1.) that the plaintiff corporation's interest in the land overlaid by and subjacent to their pipes was limited to possession under a licence ; (2.) that in the circumstances of the case they were entitled to recover damages for the injury caused to their mains and pipes as a common law nuisance by the defendants' mining operations, such possession entitling them to sue.

ACTION.

The following statement of the facts is taken from the judgment.

The plaintiffs, the mayor, aldermen and burgesses of the borough of Newcastle-under-Lyme claimed against the defendant company, Wolstanton, Ld., a declaration that the defendant company was not entitled to mine or otherwise work any coal, ironstone or other minerals under or near to the plaintiffs' gas mains laid within the township of Wolstanton or elsewhere in the borough of Newcastle-under-Lyme, in such manner as to let down, destroy or injure any of such gas mains, an appropriate injunction and damages. In the circumstances presently mentioned the claim resolved itself into one for damages only.

The plaintiff corporation sued as the gas undertakers in respect of the township of Wolstanton, the damages claimed being in respect of the gas pipes laid under the streets and pavements in that area. The plaintiff corporation became the gas undertakers for this area by virtue of the Newcastle-under-Lyme Extension Order, 1931 (made pursuant to s. 46 of the Local Government Act, 1929) which had the effect of abolishing the Wolstanton United Urban District Council and vesting in the plaintiff corporation all the property of that council and all its powers, duties and liabilities as gas undertakers. The Wolstanton United Urban District Council itself became the gas undertakers for the relevant area by virtue of the Wolstanton United Urban District Council Gas Act, 1906. Briefly, the effect of that Act, which incorporated (subject to immaterial exceptions) the Gas Works Clauses Acts of 1847 and 1871, was that the Wolstanton Council became the compulsory purchasers of the gas works, mains, pipes and other the gas undertakings (so far as related to that area) of the Newcastle-under-Lyme Corporation and of the Burslem Corporation (see ss. 9 and 10); with power to continue and maintain in the area the gas works and gas undertakings of the two corporations mentioned. It is clear, in the circumstances of the present case (1.) that all the relevant pipes and mains with which this section is concerned were laid under public highways, including footpaths; (2.) that until recent years the pipes and the gas supplied in the town of Wolstanton were derived from Burslem or (to some extent) from Chesterton and not from Newcastle-under-Lyme; (3.) that all the relevant pipes were laid in exercise of the general power contained in s. 6 of the Gas Works Clauses Act of 1847, or in pursuance of the provisions of corresponding clauses in one or other of the private Acts cited, there being no evidence of any exercise for the purpose of any powers to acquire easements or other proprietary interests by agreement; and (4.) that the pipes and mains in question were since the year 1931 vested in and the property of the plaintiff corporation having prior thereto been successively vested in and the property of the plaintiff corporation's predecessors in title.

The defendant company was incorporated in 1928 and acquired the residue of a lease of certain seams of ironstone and coal granted in the year 1917 to the defendant company's predecessors by the Crown in the right of the Duchy of Lancaster. Two only of these seams were material in the present action, namely, the Red Shagg ironstone seam at a depth of approximately four hundred and ninety yards at the shaft and the Great Row coal seam at a depth of about a hundred and seventy yards below that of the Red Shagg ironstone. Shortly after its incorporation the defendant company began to work the two seams and continued since so to do. No trouble arose between the plaintiff corporation and the defendant company until the year 1934, but from that year up to the date of the issue of the writ substantial damage was admittedly done to the plaintiff corporation's gas pipes as a result of the movement of the surface land attributable to the defendant company's mining operations. The severance of the surface of the area in question from the subjacent mines was effected very many years ago—long before any of the gas works or pipes here in question were made or laid. Both surface and minerals appear originally to have been part of the copyhold land of the Manor of Newcastle-under-Lyme.

After the severance, the Crown in the right of the Duchy claimed that they and those entitled through them to work the mines enjoyed the benefit of a customary right to extract the minerals so as to let down the surface and without any obligation to pay compensation for surface damage. This assertion was successfully challenged by a surface proprietor in 1844 before the Court of Queen's Bench in *Hilton* v. *Earl Granville* (1), but the Duchy and those interested in the minerals through the Duchy appear to have been undeterred by this reverse, and continued to assert the right to let down the surface land without payment of compensation until the plaintiff corporation, as owners of a fire station, again challenged the validity of the alleged custom. On this occasion the litigation proceeded to the House of Lords, *Wolstanton, Ld.* v. *Newcastle-under-Lyme Corporation* (2). The House affirmed the view of the Court of Queen's Bench that the alleged custom was unreasonable and finally negatived its existence.

This decision having established that the mineral owners and those claiming through them had no right so to work the minerals as to let down or injure the surface land and accordingly that the owners of the surface in which the pipes here in question were laid always had an unqualified right to the support of the land in its natural state, the defendant company, in order to carry on its undertaking, applied to the Railway and Canal Commission Court. Certain orders were made by that tribunal—the first on December 17, 1943—empowering the defendant company to work the minerals on terms of payment of compensation for damage caused. Under these orders the defendant company was admittedly entitled to work the mines so as to let down the surface but upon terms (so far as concerned the plaintiff corporation as gas undertakers) of being liable to pay compensation to them for any damage done to their gas works and pipes.

By reason of those orders the plaintiff corporation no longer asked for the declaration or the injunction mentioned in the writ but confined themselves to a claim for damages. The writ was issued on May 11, 1942; and since the plaintiff corporation conceded that the defendant company could invoke the Limitation Act, 1939, to limit its liability, the claim of the plaintiff corporation was now confined to the damage proved to

(1) (1844) 5 Q. B. 701.

(2) [1940] A. C. 860.

have been occasioned by the defendant company during the period of six years immediately prior to May 11, 1942. Particulars of the damage alleged fell under three heads, namely (1.) damage, equivalent to the cost of repairing a large number of fractures in the gas pipes or mains amounting to 812*l.*; (2.) damage, equivalent to the cost of replacing cast iron pipes with spun steel pipes where the fractures were such as to render it economically not possible to repair the pipes, or where the risk of further damage was so great as to make it impracticable to maintain iron pipes: the total under this was 5,659*l.*; (3.) damage for gas lost, this amounted for the six years from April 1, 1936, to 1,938*l.* The total damages claimed were 8,410*l.* No serious attempt was made to attribute any of the damage to frost, traffic, enemy action or any other probable cause. The amount and computation of the damage were in effect admitted by the defendant company.

There were however two subsidiary matters of fact as to the first of which there was a conflict of testimony including expert testimony, namely (1.) whether in respect of certain of its mining operations the defendant company failed to work in a reasonable and proper manner within the meaning of s. 4 of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (hereinafter referred to as the Act of 1883); and if not whether any of the damage suffered by the plaintiff corporation could be attributed to such failures: (2.) whether the plaintiff corporation had proved that any of its damaged gas pipes had been laid prior to August 25, 1883, being the date of the passing of the Act of 1883 so as to give rise to an alternative claim in respect of such pipes under s. 5 of that Act.

Harman K.C. and *Wilfrid Hunt* for the plaintiffs. The plaintiffs have a common law right of support for their gas mains and pipes laid by them or by their predecessors under statutory authority, and the defendants by their workings having deprived them of that support have caused serious damage to these gas mains, and much loss of gas from broken mains and are therefore liable in damages. The claim is limited to damage caused during the six years before 1942, since then the workings have been regulated by an order made by the Railway and Canal Commission allowing the defendants to let down the surface on payment of full compensation. The plaintiffs or their predecessors were authorized to open up streets and to lay and repair gas pipes under them by s. 6 of the Gasworks Clauses Act, 1847 and earlier private statutes. The surface land in which the pipes were laid had been severed from the subjacent minerals long before the laying of the pipes, and this surface land at all material times had an unqualified right of support from the minerals, and the defendants had no right to work the minerals so as to let down the surface. The plaintiffs and their predecessors as owners of the pipes were and are entitled to the same right of support as the land in which they were laid. The pipes are no longer chattels, but become part of the freehold, and therefore rateable: *R.* v. *Corporation of Bath* (1). The corporation occupy the land in which these pipes are laid: *R.* v. *Brighton Gas Light & Coke Co.* (2). Therefore they are entitled to the same right of support as the owners of the surface always had. It is not a mere licence or easement to use the pipes for the supply of gas: *R.* v. *Chelsea Waterworks Co.* (3). In *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (4), the undertakers were described as licensees but the point which arises here was never argued. Scrutton J. in the latter case held that the doctrine of *Rylands* v. *Fletcher* (5) applied whether the undertakers were owners of the land or not. In *Midwood & Co., Ld.* v. *Manchester Corporation* (6) the liability was also put on the ground of nuisance. *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (4) if not wrongly decided, is distinguishable. Apart from the question of right of support, the defendants' acts have damaged the plaintiffs' property and they are liable on the ground of nuisance, and the statement of claim is wide enough to cover this.

Andrew Clark K.C. and *J. B. Herbert* for the defendants. The plaintiffs have no right of support either at common law or by statute. They had a statutory right of support under the various Acts under which their pipes were laid, for any main proved to have been laid before August 25, 1883, the date when the Public Health, 1875 (Support of Sewers) Amendment Act, 1883, came into force, a grant of such right being implied in the statutes: *In re Dudley Corporation* (7). That right however was taken away on August 25, 1883, by s. 4 of the Act of 1883, and was not saved by s. 5 of that

(1) (1811) 14 East. 609.
(2) (1826) 5 B. & C. 466.
(3) (1833) 5 B. & Ad. 156.
(4) [1913] 3 K. B. 442.
(5) (1868) L. R. 3 H. L. 330.
(6) [1905] 2 K. B. 597.
(7) (1881) 8 Q. B. D. 86.

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Act because this was not a case in which no compensation was at the passing of the Act recoverable in respect of such right of support: *In re Dudley Corporation* (1). *Normanton Gas Co.* v. *Pope & Pearson, Ld.* (2); *Jary* v. *Barnsley Corporation* (3); *In re South Eastern Ry. Co. and L.C.C.'s Contract* (4); *Edinburgh & District Water Trustees* v. *Clippens Oil Co.* (5). Thereafter, the plaintiffs could only rely for a right of support for any of their pipes on such rights (if any) as they might be entitled to under the Act of 1883 by virtue of the incorporation therein of ss. 18-27 inclusive of the Waterworks Clauses Act, 1847.

The plaintiffs never acquired any statutory rights under the Act, because they failed to comply with the requirements of causing a survey and maps to be made, showing the position of the mains, and depositing such survey and maps with the clerk of the peace: *South Staffordshire Waterworks* v. *Mason* (6). The plaintiffs are not owners of any surface land, and have only such rights as are given them by statute. They have not and never have had any right to support at common law, since apart from their private statutes, they were mere trespassers.

There is no common law right of support for anything artificially placed on or embedded in the soil: see MacSwinney on Mines, 5th ed., at p. 222; *Dalton* v. *Angus* (7); *Bonomi* v. *Backhouse* (8); *Normanton Gas Co.* v. *Pope & Pearson, Ld.* (2).

The plaintiffs have no cause of action, except possibly in negligence, if negligence could be proved, which it cannot, and in any case, the action is not so framed. The plaintiffs have no such interest in the land as would entitle them to the common law right of support; they are mere licensees under the statutes without interest in the land. The rating cases are distinguishable, as rateability depends on mere occupation, not on any interest in the land: *Electric Telegraph Co.* v. *Salford Overseers* (9); *Liverpool Corporation* v. *Chorley Assessment Committee* (10); *City of Westminster* v. *Southern Ry.* (11), per Lord Russell of Killowen; *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (12).

(1) 8 Q. B. D. 86.
(2) (1883) 52 L. J. (Q. B.) 629.
(3) [1907] 2 Ch. 600.
(4) [1915] 2 Ch. 252.
(5) (1902) 87 L. T. 275.
(6) (1886) 57 L. T. 116.
(7) (1881) 6 App. Cas. 740.
(8) (1861) 9 H. L. C. 503.
(9) (1855) 11 Ex. 181.
(10) [1912] 1 K. B. 270, 287.
(11) [1936] A. C. 511, 533.
(12) [1913] 3 K. B. 442.

The question of nuisance and the rule in *Rylands* v. *Fletcher* (1) do not arise in this case. There can be no nuisance in the withdrawal of support, unless there is a right of support, which the plaintiffs have not got. The only right of support is for the surface in its natural state and it is vested in the surface owners, not the plaintiffs, who cannot set up a jus tertii. [Evershed J. referred to *Nicholls* v. *Ely Beet Sugar Co., Ld.* (2) and to the definition of nuisance in Winfield on Torts, 2nd ed., at p. 476, accepted as correct by Scott L.J. in *Read* v. *Lyons & Co., Ld.* (3).]

Harman K.C., in reply. The plaintiffs acquired a statutory easement of support for their mains and pipes under the Gasworks Clauses Act, 1847. Their original rights of support were not common law, but customary, rights, as the whole of this land was copyhold of the Manor of Newcastle. The object of the Act of 1883 was to defer the payment of compensation until the mine-owner wanted to work, and even then he might never work at all. But the Act was intended to apply to cases where the mineral worker was entitled to compensation for losing the right to let down, and on the facts of the case the Act ought to be held not to apply: *London & North Eastern Ry. Co.* v. *Howley Park Coal & Cannel Co.* (4); *Wath-upon-Dearne U.D.C.* v. *John Brown & Co.* (5). No survey or plans were made because these pipes were mostly laid long before there was any approach of the mines to the area so as to affect the surface of the land. There was no subsidence until after 1934.

Cur. adv. vult.

July 25. EVERSHED J. read a judgment in which, after stating the facts as set out above, he continued: The main question in the action is whether, apart from any rights the plaintiff corporation had or might have had by virtue of the various Acts of Parliament under which their powers were derived, or by virtue of the Act of 1883 and the so-called mining code incorporated therein from the Waterworks Clauses Act, 1847, the plaintiff corporation can assert against the defendant company any right of support or can otherwise lay the foundation of any claim at law against the defendant company, having regard to the fact that the damage suffered is undoubtedly attributable to the movement of the surface land occasioned by the defendant company's mining operations and having regard also to the circumstance that the defendant company has been shown to have had no right so to work the mines as to cause injury to the surface land. It should be added that no suggestion has been made that the movement of the surface land was in any way caused or aggravated by the presence of the plaintiff corporation's pipes or mains therein. Upon this matter certain admissions made by both sides served appreciably to narrow the issue between them. Thus, in regard to the Act of 1883 and the so-called " mining code " incorporated therewith from the Waterworks Clauses Act, 1847, it was conceded on the part of the plaintiff corporation that, apart from their subsidiary claims under ss. 4 and 5 of the Act of 1883 already noticed, they could not make any claim against the defendant company under any of the provisions of that Act or of the code. On the other hand it was admitted that if the plaintiff corporation had prior to 1883 any rights at law apart from any rights conferred upon them only by implication under their private Acts, those rights (having regard to the *Howley Park* case (1)) and later decisions to the same effect were not taken away by the Act of 1883. In the circumstances it is not necessary for me to refer in detail to the terms of the mining code in this case. Its relevant provisions were recently considered in the *Wath-upon-Dearne* case (2) by Luxmoore J. (as he then was), who drew attention to the respects in which the material sections of the Waterworks Clauses Act, 1847, differed from the corresponding sections of the Railways Clauses Consolidation Act—particularly in the use of the phrase, applicable where the undertakers have failed to avail themselves of the provisions of the code, " as if this Act and the special " Act had not been passed." It is sufficient in the present case to state that the plaintiff corporation having failed to make and keep any of the maps or surveys required by s. 19 of the Waterworks Clauses Act as amended by s. 3 of the Act of 1883, it therefore follows from the decision in *South Staffordshire Waterworks* v. *Mason* (3), that they lost any right to make any claim under the code incorporated in the Act of 1883. It equally follows in my judgment, having regard to the first part of s. 4 of the Act of 1883—" except as in this Act provided a " local authority shall not by reason *only* of anything contained " in the Sanitary Act "—that the plaintiff corporation cannot assert any claim which they might have had according to the principle of the decisions in *In re The Dudley Corporation* (1) and *Normanton Gas Co.* v. *Pope & Pearson* (2), by implication from any of the provisions of any of the private Acts (that is the Sanitary Acts) applicable.

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(1) (1868) L. R. 3 H. L. 330.

(2) [1931] 2 Ch. 84.

(3) [1945] K. B. 216, 236.

(4) [1911] 2 Ch. 97; [1913] A. C. 11.

(5) [1936] Ch. 172.

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(1) [1913] A. C. 11.

(2) [1936] Ch. 172.

(3) 57 L. T. 116.

Mr. Harman did not indeed contend to the contrary : he said that the implied rights which were held to have arisen in those cases did not arise in the present case because the fact of the surface having an unqualified right to support made any such implications unnecessary and, therefore, negatived their existence. But it was alternatively claimed by Mr. Harman that even though all statutory rights had been lost by the plaintiff corporation in regard to what may be called the forty yards strip, the plaintiff corporation were nevertheless entitled to make a claim either under the common law or by implication from their private or Sanitary Acts in respect of damage arising from mining operations outside the forty-yard limit. In my judgment no question arises in the present action in regard to the forty-yard strip. Either the plaintiff corporation have a right to recover in respect of all the damage suffered independently of the statutes (including the mining code) in which case no question of the forty-yard limit arises ; or the plaintiff corporation, having no such right, have no cause of action at all against the defendant company apart from the ancillary points arising under ss. 4 and 5 of the Act of 1883 already indicated with which I deal later in this judgment.

The essential question remains upon the threshold of the case—the question which has given me the greatest difficulty—whether apart from the effect exclusively attributable to their private Acts and to the Act of 1883 including the mining code the plaintiff corporation had and have any claim or right at law against the defendant company. The precise point, as it has been raised in this case, does not appear previously to have been considered by the courts. The property in the mains and pipes, in the chattels themselves, is clearly vested in the plaintiff corporation. But what is the right or interest of the plaintiff corporation in respect of the land, that is (*a*) in respect of the space or area occupied by the pipes, (*b*) in respect of the subterranean strip of land on which the pipes rest ? Such right or interest must be one or other of the following : the plaintiff corporation may be owners or proprietors, they may be tenants, they may have an easement or some other incorporeal right

(1) 8 Q. B. D. 86.

(2) 52 L. J. (Q. B.) 629.

analogous to an easement, they may be licensees. Having determined what that right or interest is the plaintiff corporation will be entitled to prosecute such claims as flow therefrom according to the general law and do not therefore arise by reason only of the Sanitary Acts.

The answer to the problem must depend upon the true interpretation and effect of the relevant statutory powers exercised in regard to the laying and maintenance of the pipes by the plaintiff corporation or their predecessors as gas undertakers. And, since all the pipes in question were laid under public highways these powers are to be found in s. 6 of the Gas Works Clauses Act, 1847, incorporated with all the relevant private Acts, or in provisions of those Acts which may for present purposes be taken to be similar to those of s. 6 of the Act of 1847. By this familiar section, power is given to break up streets, to lay pipes, to repair and remove them, to remove the earth displaced, and to do all other acts necessary for the execution of the preceding powers, the undertakers paying compensation for all damage done in the execution of such powers. Section 7 of the same Act, which is expressed as a proviso to s. 6, prohibits the laying of pipes in land not dedicated to the public save with the consent of the owner and occupier of such land. By way of interpolation it may be noted that according to the evidence in the case the greater part at any rate of the pipes in question are laid at a depth of between two feet and three feet below the surface, that is at a depth below the highway, and below so much of the surface land as would prima facie be required for the making and support of the highway. But it has been decided by Eve J. in 1913 in *Schweder* v. *Worthing Gas Light & Coal Co., Ld.* (1), that pipes laid at such depths as these pipes were laid must for the purposes of s. 6 be regarded as laid in land dedicated to the public and not in private land to which s. 7 of the Act would apply. To the contrast with s. 6 of the Act of 1847 provided by s. 7 must be added the further contrast provided by s. 10 of the Gas Works Clauses Act, 1871, giving power to the undertakers as therein provided to acquire easements by agreement and the latter contrast is reflected in the express powers to be found, for example, in the Burslem Local Board Gas Act, 1877, and the Newcastle-under-Lyme Corporation Act, 1877, to acquire easements by agreement and also (subject to the strict limits imposed) to acquire land. (See, for example,

(1) [1914] 1 Ch. 118.

ss. 10 and 11 of the Burslem Act, and ss. 48 and 49 of the Newcastle Act). I add that the exercise of all the powers to which I have referred must plainly be limited by reference to the purpose of the gas undertakers, that is, the supply of gas, and would therefore come to an end if the undertakers ceased to carry on such undertaking.

In these circumstances and bearing in mind the general rule that no greater rights or interests should be treated as conferred on the undertakers than are necessary for the fulfilment of the object of the statute, it seems to me reasonably clear as a matter of the construction of s. 6 of the Act of 1847, that the terms of the section are not intended to confer and are not apt to confer on the undertakers any right of ownership or proprietorship of the land affected. Equally in my judgment is the language of the section inappropriate to create in favour of the undertakers any tenancy or any easement or interest analogous to an easement. It is true that the rights of the undertakers are the creatures of statute, and that it is within the competence of Parliament to confer or create interests without regard to those incidents which are regarded as requisite to an agreement inter partes. Thus, Parliament may create an easement in gross as it may, I assume, create a tenancy without provision for the payment of rent and notwithstanding the absence of any term certain. But the absence of the incidents ordinarily appropriate to the existence of a tenancy or of an easement is, at the least, an important consideration for the determination of the question whether on the true construction of the statute the creation of any such interest was intended. It is indeed somewhat tempting to conclude that some right in the nature of an easement ought to be inferred ; and I have in mind the reference to a wayleave in the speech of Lord Atkinson in *New Moss Colliery Co.* v. *Manchester Corporation* (1). But in my judgment these considerations are insufficient to give to the language of s. 6 of the Act of 1847 a meaning and intent which that language—particularly in the light of the contrasts to which I have already referred—cannot naturally or properly bear. Reference was made in the course of the argument to that species of property commonly known as flying freeholds. It is sufficient in my view to say that there is no real analogy between flying freeholds and pipes or cables laid under special Acts ; and I do not think that any assistance is obtained towards the solution of the problem of the latter by consideration of the former.

(1) [1908] A. C. 117, 124.

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It follows that, if I am right so far, the interest of the undertakers must be that of licensees without any title, legal or equitable, in the land itself. And this conclusion is consistent with the assumption on which the case of the *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (1) was decided by Scrutton J. and the Court of Appeal. In that case the question was whether the rule of liability in *Rylands* v. *Fletcher* (2) applied where both plaintiffs and defendants were persons or corporations having statutory rights, analogous to those of the plaintiff corporation or their predecessors in the present case, to lay and maintain cables or pipes in or under public highways. On behalf of the Hydraulic Power Co. it was argued that since the Charing Cross Co. were merely licensees in respect of their cables they had no cause of action against the defendants in respect of the damage admittedly attributable to the defendants' water pipes. In both courts the decision was to the effect, assuming the Charing Cross Co. to be licensees in respect of their cables, that nevertheless that company was entitled to maintain the action. It is true, as Mr. Harman pointed out, that in neither court was it necessary to decide nor was the question in terms decided whether the right or interest of the plaintiffs (and of the defendants) was that of licensees merely. But in the Court of Appeal Lord Sumner said (3): " It seems to me therefore that this is a simple case of " two independent persons licensed to pass their apparatus " through the soil—the ownership of which is not material " here—with the additional rights of breaking up the super-" incumbent surface of the highway." Both the court of first instance and the Court of Appeal proceeded, without any reservation and without any expression of doubt as regards the validity in this respect of the argument for the defendants, upon the view that those empowered—or compelled—by statute to lay cables in or under the public highway could invoke the principle of *Rylands* v. *Fletcher* (2) notwithstanding that they could not assert any right or interest in the land in which their cables were laid. It is therefore in my view, not permissible to treat the *Charing Cross* case (4) otherwise than as some authority for the view that the rights of the plaintiff corporation in the present action are those of licensees only—a view to which some support is given at p. 222 (para. 752) of MacSwinney on

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(1) [1913] 3 K. B. 442; [1914] 3 K. B. 772.

(2) L. R. 3 H. L. 330.

(3) [1914] 3 K. B. 781.

(4) Ibid. 772.

Mines, 5th ed. "In several of the cases the interest vested in "the undertakers was not any right of property in the land but "a mere right to make and maintain work on the land which "remains the property of another"—the cases referred to including the *Dudley* (1) and *Normanton* (2) cases (supra), and also *Jary* v. *Barnsley Corporation* (3).

Against the effect of the *Charing Cross* decision Mr. Harman relied upon a number of rating cases, namely: *R.* v. *Bath Corporation* (4); *R.* v. *Brighton Gas Co.* (5), and *R.* v. *Chelsea Waterworks Co.* (6), and to certain observations of the judges in those cases. Thus, in the second of the three cases it was stated by Bayley J. in the course of his judgment (see p. 471 of the report): "The (Gas Company's) pipes were laid so as to "become part and parcel of the land." In the third of the cases a quotation was made by counsel supporting the rate from the judgment of Parke J. in an earlier case (see p. 165 of the report): "No person can be an occupier unless he has the "exclusive right to enjoy some portion of the soil"; and Denman C.J. concludes his judgment with the phrase: "They" (the Chelsea Waterworks Co.) "appear to us to have "the exclusive right in a portion of the soil . . . though for a "limited purpose only."

It is to be observed that in all the rating cases the question before the court was whether the subject sought to be rated was an "occupier of lands" within the meaning of the Statute 43 Elizabeth, ch. 2. As regards the word "land" the effect of the cases has been to give a wide interpretation to it; and as regards the word "occupier" the effect has been to establish that the question is one of fact—whether, to state the matter briefly and without attempting a definition, the subject sought to be rated was in de facto possession to the substantial exclusion of any enjoyment of the land by others and in circumstances importing some degree of permanence; and it has been clearly laid down that the question is not a matter of title and does not depend upon title. In the words of Lord Russell of Killowen in the *City of Westminster* v. *Southern Ry.* (7): "It is im-"material whether the title to occupy is attributable to a lease, "a license or an easement." I cite also the language of Wightman J. in *R.* v. *West Middlesex Waterworks* (8) quoted with

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(1) 8 Q. B. D. 86.
(2) 52 L. J. (Q. B.) 629.
(3) [1907] 2 Ch. 600.
(4) 14 East 609.
(5) 5 B. & C. 466, 471.
(6) 5 B. & Ad. 156, 165.
(7) [1936] A. C. 511, 533.
(8) (1859) 1 E. & E. 716, 720.

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approval by Lord Davey in *Holywell Union* v. *Halkyn Drainage Co.* (1): "The first question is whether the company are "rateable for their mains which are laid under the surface of "the highway without any leasehold or freehold interest in the "soil thereof being vested in the company. We think they are. "The mains are fixed capital vested in land. The company "are in possession of the mains buried in the soil and so are "de facto in possession of the space in the soil which the mains "fill for a purpose beneficial to itself. The decisions are "uniform in holding gas companies to be rateable in respect of "their mains though the occupation of such mains may be de "facto only and without any legal or equitable estate in the "land where the mains lie, by force of some statute."

I have dealt at some length with this aspect of the matter since there appears to be in the books no authoritative pronouncement upon the true nature of the interest in or relating to the land of persons or corporations authorized by statute in the terms of s. 6 of the Act of 1847 or of other comparable statutes to lay pipes or cables under highways. I venture to state my conclusion upon the position of the plaintiff corporation as follows: they have by force of the statute the exclusive right to occupy for the purposes of their statutory undertaking the space in the soil taken by the pipes and that (subterranean) part of the soil on which the pipes rest; but that exclusive right of occupation, which continues so long as the corporation carry on their undertaking, does not depend upon or involve the vesting in the plaintiff corporation of any legal or equitable estate in the land. If the language in note (*a*) to para. 786 at p. 355 of vol. XXVII. of Halsbury's Laws of England (Hailsham Edition) is to be taken to imply that persons or corporations who have laid pipes or cables under statutory powers similar to those applicable to the plaintiff corporation and their predecessors in the present case have an interest in the land of the nature of an easement and that the rating decisions proceed from such a view, I do not think such a conclusion is justified and I find myself unable to accept it. It follows that the plaintiff corporation cannot in my judgment say that there is vested in them any right of support as such or that they are, as Mr. Harman put it, the inheritors of the right of support admittedly vested in the owners of the surface land. But does it follow from this proposition that the plaintiff corporation cannot sue for the damage suffered from the unlawful interference by the defendant company with the surface land—unlawful because the mineral owners have no right so to work their mines as to injure the surface? In my judgment, no.

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(1) [1895] A. C. 117, 132.

The cause of action which the plaintiff corporation seek to prosecute is for the unlawful interference with the natural right of support of the land, that is for nuisance—under the old forms, an action on the case. The answer of the defendant company, as it was forcibly put by Mr. Clark in his argument, was, briefly, " damnum sine injuria "; since the right which the plaintiff corporation say that the defendant company had infringed was vested in another, so that the plaintiff corporation were seeking to assert and rely upon a jus tertii. It is, therefore, pertinent to see what are the nature and essentials of an action for nuisance. It is undoubtedly of the essence of the matter that the wrong is a wrong done in respect of land; but in respect of what rights or interests in land? In the recent case of *Read* v. *J. Lyons & Co., Ld.* (1), Scott L.J., at the end of an examination of the characteristics of the action, accepted Professor Winfield's definition (see s. 129, p. 426 of the 3rd ed. of his book on Torts) " as unlawful interference with a " person's use or enjoyment of land, or of some right over or " in connexion with it."

In my judgment it would be impossible to say that the rights of the plaintiff corporation, which I have attempted to define, in regard to the land occupied by their pipes or on which their pipes rest are not comprehended by the last ten words of the definition. But if it be said that for the purposes of his judgment it was not necessary for Scott L.J. to distinguish, and that he did not distinguish, between the nature of the action on the one hand and, on the other, the question who is entitled to sue, further analysis leads, in the present case, to the same result. For though the cause of action may consist in an unlawful interference with land or with property in land, prima facie possession is sufficient to maintain the action. As Scott L.J. observed immediately before his acceptance of Professor Winfield's definition " . . . . as against the trespasser or other " infringer the plaintiff's right of possession was as good as a " right of property, unless the defendant could set up a title to " himself." No doubt mere occupation in fact without any right may be insufficient: see, for example, *Malone* v. *Laskey* (2). In that case the plaintiff in the action was the wife of an employee of a company to which the premises in question had been sub-let and her husband was permitted to occupy the house as an incident of his employment. In the circumstances it was held that she could not maintain an action for nuisance in respect of the injury she had suffered in the house. Sir Gorell Barnes P. observed in delivering the leading judgment in the Court of Appeal that there was no authority for the view that a person who "has no right of occupation in any proper "sense of the term" could maintain an action for nuisance. But in my judgment there is no principle involved in this decision or in the well-known case of *Hill* v. *Tupper* (1), also referred to in argument, to the effect that the action is only maintainable at the suit of a plaintiff whose possession is referable to some title to the land. Normally the plaintiff's possession, if it is not of a merely fleeting or casual character but attributable to a right, will be referable to some legal or equitable interest in or title to the land. But, in my judgment, there is nothing in logic or authority to disqualify a plaintiff having by force of statute such right of possession as have the plaintiff corporation in the present case from suing at common law in respect of the damage flowing from a wrongful interference with the natural right of support for the land.

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(1) [1945] K. B. 216, 236.

(2) [1907] 2 K. B. 141, 151.

I am not attempting to assert any general proposition. It is sufficient for me to decide only that in the particular circumstances of the present case, the plaintiff corporation are entitled to maintain their action. And the particular circumstances to which I allude are the following:—(1.) that the plaintiff corporation have, by force of statute, the exclusive right which I have defined to the possession of so much of the surface land as is occupied by their pipes and on which their pipes rest; (2.) that the damage suffered by the plaintiff corporation is the direct and inevitable consequence of the defendant company's interference with the natural right of support attaching to the surface land, there being no suggestion that either the subsidence or the damage was in any way attributable to or aggravated by the presence of the pipes on or in the land; and (3.) that the interference by the defendant company with the right of support was wrongful or unlawful having regard to the fact that the surface land had an unqualified right of support in its natural state from the subjacent minerals.

I add that the conclusion at which I have arrived is in my judgment supported by the text-books. Thus, in Salmond on Torts, 10th ed., at p. 221, it is stated that "the generic con-

(1) (1863) 2 H. & C. 121.

" ception involved in nuisance may, however, perhaps be found " in the fact that all nuisances are caused by an act or omission, " whereby a person is unlawfully annoyed, prejudiced or dis- " turbed in the enjoyment of land; whether by physical " damage to the land or by other interference with the enjoy- " ment of the land or with his exercise of an easement, profit " or other similar right or again with his health, comfort or " convenience as occupier of such land"; again, at p. 223, " There seems no reason why possession without title should not " as a general rule be sufficient to enable a plaintiff to succeed " in nuisance so that the jus tertii cannot be set up as a defence": and reference is made to the considerations affecting servitudes, which are considered at pp. 243 to 245. In the passage last mentioned the learned editor suggests that a distinction should be drawn between natural and acquired servitudes, a possessory title being valid in the former case, if not in the latter. The distinction is illustrated by reference to two recent cases, *Nicholls* v. *Ely Beet Sugar Factory* (1) decided by Farwell J. in 1931, and *Paine & Co.* v. *St. Neots Gas Co.* (2), decided by Goddard L.J. sitting as a judge of first instance, and by the Court of Appeal in 1938 and 1939.

Since, in the present case, the right interfered with by the defendant company was the natural right of support for the land itself, which was described in the leading case of *Dalton* v. *Angus* (3), as being among the natural as opposed to the conventional or " acquired " servitudes, it may be useful to make some further reference to the two cases cited in Salmond. In *Nicholls* v. *Ely Beet Sugar Co.* (1), the plaintiff sued for damage by pollution done to a several fishery. One of the defences to the claim was to the effect that the river in question was, at the material part, tidal and accordingly that the plaintiff had not proved, and could not prove, a grant sufficiently ancient in favour of some person through whom he claimed, as to vest any title in himself. On this defence Farwell J., following the earlier case of *Fitzgerald* v. *Firbank* (4)—also relating to the right to the unpolluted flow of a natural watercourse—held that the plaintiff's possession was sufficient to enable him to maintain the action, being careful (as I wish to be careful in the present action) to limit his decision to the case before him and not to lay down a general rule applicable to all actions for nuisance. On this decision Professor Winfield observes, at

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(1) [1931] 2 Ch. 84.

(2) [1938] 4 All E. R. 592; [1939] 3 All E. R. 812.

(3) (1881) 6 App. Cas. 740.

(4) [1897] 2 Ch. 96.

p. 460 of the 3rd ed. of his book: "It is not obvious why the "principle should have been stretched to nuisance of any kind, "whether to a fishery or otherwise; for to commit a nuisance "to another person's property does not necessarily constitute "a reflection on his title to it (the essence of conversion) and, "even if it did, it is quite sufficient for the person who wishes to "sue for nuisance to have possession of the property to enable "him to bring the action; in fact, he cannot sue unless he has "possession. If that be the law, what has jus tertii to do with "the question?"

In *Paine & Co.* v. *St. Neots Gas Co.* (1), the plaintiff company's claim was in respect of the pollution of certain springs or sources the water from which the plaintiff company claimed to be entitled to take by means of a well sunk and pipes laid by them in and over certain common land under a grant made in their favour by four persons purporting to act as or on behalf of the commoners. It was held that these persons had no right or title to make any such grant. But the plaintiff company alternatively claimed to be able to rely upon possession without title. It is to be noted that the plaintiff company's claim of possession related not to any part of the land itself (which was common land) but to an interest in the land which was in the nature of an easement, the title to which could only be acquired by grant or prescription. In the court of first instance, Goddard L.J. held that a possessory title would not support an action for the protection of an easement and expressed the view that in the case of an easement for the support of a *building* the plaintiff must prove a title. The Court of Appeal held that the plaintiff company had in fact failed to prove possession. On the point material for present purposes, Scott L.J. accordingly found it unnecessary to express any opinion; but Luxmoore L.J. stated (2) his view that in the case of an easement such as was alleged in that case a title must be shown since the nature of the right asserted (that is, the right to carry water over the land of another) necessarily excluded the possibility of possession of the servient tenement; and (after referring to the *Ely Beet Sugar* case (3) and to *Fitzgerald* v. *Firbank* (4), he pointed to the distinction between an easement of the character with which the appeal was concerned and a profit-a-prendre, the latter being possessory in character and capable of existing in gross.

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(1) [1938] 4 All E. R. 592.

(2) [1939] 3 All E. R. 823.

(3) [1931] 2 Ch. 84.

(4) [1897] 2 Ch. 96.

In my judgment the *Paine* v. *St. Neots Gas Co.* (1) case is wholly distinguishable upon its facts from the present case. Having regard to the nature of the plaintiff corporation's rights, none of the observations of Luxmoore L.J. would be applicable to them: nor do I think that the more general language of Goddard L.J. (which so far as it related to rights of support was limited to support for a building) could be or was intended to be referable to the state of facts in the present action. On the other hand some support for my own conclusion is, in my judgment, fairly to be obtained on principle from Farwell J.'s decision.

I refer finally to two passages in Pollock on Torts, 14th ed., pp. 322, 323, where it is stated: " In the modern authorities " (the conception of private nuisance), " includes all injuries to " an owner or occupier in the enjoyment of the property of " which he is in possession without regard to the quality of the " tenure," reference being made to the observations of Sir George Jessel M.R. in *Jones* v. *Chappell* (2). And in Pollock at p. 341 under the heading: " Parties ": " As to the person " entitled to sue for a nuisance: as regards interference with " the actual enjoyment of property, only the tenant in possession can sue," to which passage there is a footnote: " Not a " person who is there merely as a servant or licensee, *Malone* " v. *Laskey* (3)." As regards the footnote, I have already referred to the case of *Malone* v. *Laskey* (3) and to the judgment of Sir Gorell Barnes therein. It is to be observed that the passages which I have quoted from the 14th ed. of Pollock on Torts appear, totidem verbis, in the last edition edited by Sir Frederick Pollock himself—see 8th ed. (1908), pp. 405 and 430; and (save for the footnote referring to *Malone* v. *Laskey* (3)) the same language is found in Sir Frederick's original text—see pp. 329 and 349 in the 1st ed. of 1887.

I add two observations upon the above argument: (1.) The conclusion at which I have arrived is at least satisfactory in this respect that a contrary conclusion would, as it seems to me, have conferred a wholly casual benefit upon the defendant company and their lessors by relieving them of part of their obligation to support the surface. For it is difficult to see how, quoad that part of the surface land which is in the exclusive possession of the plaintiff corporation, any one else could maintain an action for interference with the right of support. (2.) On the view I have taken I am disposed to agree with

(1) [1938] 4 All E. R. 592.

(2) (1875) L. R. 20 Eq. 539, 543.

(3) [1907] 2 K. B. 141.

Mr. Harman's submission that there was no room in the present case for the operation of the principle illustrated in *In re Dudley Corporation* (1) and *Normanton Gas Co.* v. *Pope & Pearson* (2). The implication might indeed be said to be inconsistent with the rights of the plaintiff corporation as I have found them. The implied right of support derived from the Sanitary Acts would have carried with it the duty under those Acts of paying compensation to those entitled to the minerals, whereas, according to the view I have taken, the plaintiff corporation's right of possession gave them at law and apart from their statutes the right to maintain an action to recover damages caused by any withdrawal of support and, on proof of apprehension of such damage, for an injunction to prevent its occurrence.

Having expressed my conclusion upon the merits, there remains a question whether the point is open to the plaintiff corporation upon their statement of claim as it stands. Although it is clear that all essential facts are pleaded I was at first inclined to think that having regard to the terms of para. 8 of the statement of claim the plaintiff corporation had so founded their case upon the allegation that a right of support was vested in them as, by inference, to exclude a claim based on possession without title. On further reflection, I think such a view ignored the force of the general allegations in para. 9 of the pleading, and I hold that the matter is open to the plaintiff corporation upon their existing statement of claim.

If I am right in the conclusion I have expressed, my decision covers the whole of the damages claimed by the plaintiff corporation. But having regard to the importance of the case I should, in case I am wrong, express my view on the two subsidiary claims which I have mentioned above. The first of these subsidiary matters may be stated thus, that notwithstanding the general effect of the Act of 1883, the plaintiff corporation are still entitled by virtue of the second part of s. 4 of that Act to recover such damages as they can prove to have been occasioned by the workings of the defendant company otherwise than in a reasonable and proper manner. I read s. 4 of the Act in full: "Except as in this Act provided, a local "authority shall not by reason only of anything contained in "the Sanitary Act under the authority of which a sanitary "work has been or is constructed or maintained be deemed to "have acquired or to be entitled to or to be bound to acquire or

(1) 8 Q. B. D. 86.

(2) 52 L. J. (Q. B.) 629.

" make compensation for any right of support for such sanitary " work as against any person owning or working or being lessee " or occupier of or entitled to work or otherwise interested in " any mine ; and nothing in such Sanitary Act shall be deemed " to have subjected or to subject any such person to any " liability to the local authority in respect of damage to a " sanitary work caused in or consequent upon the working of " any mines in a reasonable and proper manner." It has already been stated by judges that the section is difficult to construe, and I take this opportunity of adding myself to their company. The first part of the section, as far as the semicolon, appears briefly to have the effect of substituting (save as provided by s. 5) for the right to recover in respect of the removal of support by virtue of the provisions of the Act under the authority of which the pipes were laid (that is, " the " Sanitary Act ") the rights derived from the so-called mining code contained in ss. 18 to 27 both inclusive of the Waterworks Clauses Act, 1847, made applicable (subject to the terms of the section) by s. 3 of the Act of 1874. It is therefore difficult to see as a matter of construction how the second part of s. 4 can have the effect of preserving, still less of creating by inference, a right of action for damages arising out of the Sanitary Act in respect of unreasonable or improper working. It is, however, unnecessary for me to attempt any further exposition of the intended effect of the second part of this section since I am not satisfied on the facts that any of the defendant company's workings were not reasonable or proper within the meaning which I attach to those words in the section : and in any case the plaintiff corporation, if and so far as such workings were unreasonable or improper, have in my judgment not proved that any of the damage suffered by them can be attributed to such workings rather than to the general mining operations of the defendant company.

[His Lordship then examined the evidence as to the working of the defendants' mines and held that the plaintiffs had failed to prove damage due to unreasonable or improper working or irregularity in the layout.]

It is not, I think, sufficient to establish that particular workings were unusual or contary to the normal practice that would be followed in mining. If the workings are to be shown to fail to satisfy the condition of being reasonable, they must, as I think, be shown to have been such as cannot be reasonably explained or justified, similarly the workings can only be said not to have been proper if it is shown that in all the circumstances of the case and bearing in mind all the problems facing those responsible at the time, including the obligations of the mining lease, the decision taken was incorrect and such as could not be supported by technical men.

I now pass to the second subsidiary point made by the plaintiff corporation. This turns on s. 5 of the Act of 1883. The first part of the section is plainly designed to save any rights conferred by express provision in any Sanitary Act or in any agreement or pending proceedings, whether in court or by way of arbitration. The second part of the section is in the following terms: "Where any right of support has been "acquired before the passing of this Act by a local authority "in respect of any sanitary work, and no compensation is at "the passing of this Act recoverable in respect of such right, "nothing in this Act shall be construed to apply to the work in "respect of which such right has been acquired, or operate to "deprive the local authority of such right or to entitle any "person to any compensation in respect thereof, to which such "person would not have been entitled if this Act had not been "passed." The argument of the plaintiff corporation was that some at least of their gas pipes were laid before the passing of the Act of 1883, that is before August 25, 1883, and that since no compensation was or could ever have been payable in the circumstances in respect of those pipe-laying operations the Act of 1883 did not take away the rights which had been conferred upon the plaintiff corporation by virtue of the principle of the *Dudley* (1) and *Normanton* (2) cases under the Sanitary Acts in question or otherwise. On the construction of the material part of s. 5 I have the guidance of the judgment of Parker J. at pp. 616 to 618 of the report of *Jary* v. *Barnsley Corporation* (3), from which the present case differs upon the facts in that in the latter no assessment of compensation has ever been made. As regards the question of fact it was conceded that it would be sufficient for present purposes if the plaintiff corporation proved that any of their damaged pipes were in fact laid before August 25, 1883, and that it would then be a matter for inquiry to investigate further which pipes throughout their whole system had been so laid, including in the inquiry all cases where the pipes originally laid had been replaced in situ by other pipes.

(1) 8 Q. B. D. 86.

(2) 52 L. J. (Q. B.) 629.

(3) [1907] 2 Ch. 600.

[His Lordship then held on the evidence that the plaintiffs had proved that some of their pipes were laid before August 25, 1883.]

The question however remains whether it can be said within the meaning of s. 5 of the Act of 1883 that at the date of the passing of the Act any "compensation was recoverable" in respect thereof.

It is of course plain that if the plaintiff corporation's claims in regard to their pipes depend on rights, as I have found them wholly independent of their Sanitary Acts, there would have been no compensation payable in respect of those pipes at the material date. But on this view it is obvious that the plaintiff corporation do not require to rely on s. 5 of the Act of 1883 at all. The matter has therefore to be considered on the hypothesis that the plaintiff corporation's rights did depend on the inference to be drawn from their Sanitary Acts by virtue of which the pipes were laid, following, as I have indicated, the principle laid down in the *In re Dudley Corporation* (1) and *Normanton Gas Co.* v. *Pope & Pearson* (2) cases. According to that principle the corporation would obtain a right of support as being necessary to make effective the powers conferred upon them by their Sanitary Acts; but for that right of support they would be liable to pay compensation if those interested in the minerals could successfully contend that they suffered any loss or injury as a result of the implied right of support. It is reasonably clear from the evidence (as I have stated earlier) that no proceedings had in fact ever been taken with a view to assessing such compensation. It is not, however, necessary that steps for assessing such compensation should be taken immediately the pipes were laid—a claim could be made and the compensation fixed at any time thereafter. The argument of Mr. Harman in the circumstances was that by reason of the unqualified right of support which the surface owners (as distinct from the gas undertakers) had as against the mineral owners it necessarily follows that upon any proceedings for compensation there must have been an award of nil; in other words that no compensation was ever payable and therefore that at the material date, namely August 25, 1883, no compensation was recoverable. I find myself unable to accept that argument. Nor do I accept the view that because no claim was ever made or assessed I should therefore assume that the mineral owners and those claiming under them must be taken

(1) 8 Q. B. D. 86.

(2) 52 L. J. (Q B.) 629.

to have abandoned any claim which they might otherwise have had. I have considered whether the use of the word "re-"coverable" should be taken to import that there must have been, prior to the date in question, an assessment or finding that some compensation was payable and that at the material date the sum awarded or some part thereof was outstanding. My view, however, is that in order to satisfy the requirements of the section the plaintiff corporation must either show that compensation having been assessed the whole sum had been paid, or, in the absence of any assessment, that no compensation could in any event properly have been awarded. It is true that upon the assessment of a claim an arbitrator might have awarded no compensation or a purely nominal sum. The matter would, however, have been one entirely for the arbitrator's consideration bearing in mind all the relevant circumstances. And if it be correct that, notwithstanding the mineral owners' disregard in 1883 of the decision in *Hilton* v. *Earl Granville* (1), the arbitrator must have taken into account the circumstance that, in law, the mineral owners had no right to let down or injure the surface land, he would also, in my judgment, have been entitled to take into consideration that the statutory right of support which the gas undertakers derived from their sanitary Acts created a new and additional set of obligations for the mineral owners, had introduced a new and powerful figure to the ranks of those with whom the mineral owners might have to reckon in the course of working the minerals. If Mr. Harman is right in suggesting that the correct award for the arbitrator to have made would have been nothing or a merely nominal sum (as on the assumed premises I greatly doubt), still it cannot, in my opinion, be said that any other award must have been bad or would have been absurd.

In this connexion I refer to the observation of Lord Robertson in the case of *Edinburgh, etc., Water Trustees* v. *Clippens Oil Company* (2): " . . . . Even if the facts enabled the appellants "to say that this circumstance reduced the compensation to "zero instead of only to a 'fractional part' the question would "still have been within the arbitration and not outside it." The case cited was a case in which an argument similar to Mr. Harman's was put forward by the appellants in respect of certain of their waterpipes. For these pipes the appellants had no right of support other than that implied from their relevant private Acts; but the pipes were placed in such close

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(1) 5 Q. B. 701.

(2) (1902) 87 L. T. 275, 279.

EVERSHED J.

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juxtaposition to other pipes of the appellants which they were entitled to have supported that damage to the former could not in fact occur, as it was claimed, without unlawful interference with the latter. I therefore hold, upon the hypothesis of the plaintiff corporation's rights of support prior to 1883 depending on their Sanitary Acts, that they fail to satisfy the conditions for the preservation of such rights in accordance with the second part of s. 5 of the Act of 1883. The conclusion of the whole matter is therefore, in my judgment, that the plaintiff corporation either wholly succeed or wholly fail in the action according as they succeed or fail in establishing a right independent of the statutes. And since, in my judgment they do so succeed, they are entitled to the relief which they now claim.

Damages were agreed at 4,500*l.*

Solicitors: *Sharpe, Pritchard & Co., for J. Griffith, Town Clerk, Newcastle-under-Lyme; Routh, Stacey, Hancock & Willis, for Ellis & Ellis, Burslem.*

H. L. L.

Distinguished. *Re* GREENWOOD'S AGREEMENT. [1949] 2 All E.R. 743.

Distinguished. *In re* GREENWOOD'S AGREEMENT [1950] 1 Ch. 33

NORTHCHURCH ESTATES, LIMITED *v.* DANIELS.

EVERSHED J.

1946

Oct. 22.

Landlord and tenant—Memorandum of agreement—Agreement to let premises for one year, tenant having option to renew tenancy from year to year—Perpetually renewable leasehold—Validity—Law of Property Act, 1922 (12 & 13 Geo. 5, c. 16), s. 145; sch. 15, para. 7—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 149, sub-s. 3.

By a memorandum of agreement, dated January 14, 1938, a landlord agreed to let a farm to a tenant at a yearly rent of 39*l.*, for one year, the tenant having the option to renew the tenancy from year to year, notice of such intention to renew the tenancy to be given in writing on or before December 25, in each year:—

Held, that the contract was a contract for the grant of a perpetually renewable leasehold, as described by para. 7 of Sch. 15 to the Law of Property Act, 1922, and that a tenancy was thereby created for a term of 2,000 years in favour of the tenant.

Gray v. *Spyer* [1922] 2 Ch. 22 applied.

ADJOURNED SUMMONS.

By a memorandum of agreement, dated January 14, 1938, a landlord agreed to let to a tenant, at a yearly rent of 39*l.*, "All that messuage or dwelling-house and premises . . . . "known as Hill Farm Cottage Northchurch near Berkhamsted "in the County of Hertford . . . (*b.*) The term shall be for a "period of one year certain from March 25, 1938, the tenant "having the option to renew the tenancy from year to year "on identical terms and conditions as hereinunder stated "notice of such intention to renew the tenancy to be given in "writing on or before December 25 in each year." The tenant thereby agreed: "(*f.*) to permit prospective tenants "or purchasers to view the house and premises at reasonable "times of the day during the last six months of the tenancy "and to allow the landlord or his agents to erect and maintain "any notice boards they may wish to place on the premises "during the same period." The landlord thereby agreed: "(*b*) to keep the structure outer walls roof and exterior drainage "system of the house in good repair and condition and to "paint the outside of the premises and buildings as and when "may be reasonably necessary."

A summons was taken out by the landlord to determine whether the memorandum of agreement was void under s. 149, sub-s. 3, of the Law of Property Act (1), as being a contract to create a series of terms for one year each, all of which, other than the first twenty-one thereof, were limited to take effect more than twenty-one years from the date of the memorandum; or, alternatively, what interest, if any, was given by the said instrument to the party therein described as "the tenant."

L. A. Blundell for the plaintiff.
Danckwerts for the defendant.

(1) By s. 145 of the Law of Property Act, 1922, it is provided: "For the purpose of converting "perpetually renewable leases and "underleases . . . . into long "terms, for preventing the "creation of perpetually renew- "able leasehold interests and for "providing for the interests of the "persons affected, the provisions "contained in the Fifteenth "Schedule to this Act shall have "effect." By para 7 of that schedule it is provided: "(1.) Any "contract entered into after the "commencement of this Act, for "the grant of a lease, subterm, or "other leasehold interest with a "covenant or obligation for per- "petual renewal shall . . . . operate "as an agreement for a demise for "a term of two thousand "years . . . ."

By s. 149, sub-s. 3, of the Law of Property Act, 1925, it is provided: "A term at a rent . . . . "limited after the commencement "of this Act to take effect more "than twenty-one years from the "date of the instrument purporting "to create it, shall be void, and "any contract made after such "commencement to create such a "term shall likewise be void."

EVERSHED J. It is argued by Mr. Danckwerts that the parties to the original agreement could not have had in their minds (or as firmly fixed in their minds as they should have had) the provisions of the legislation of 1922 and 1925 relating to perpetually renewable leaseholds. Certainly they appear to have neglected to pay the regard which, perhaps, they should have paid to the discouragement intended by those Acts in respect of the creation of perpetually renewable leaseholds.

But, if the effect nevertheless was to agree to create, according to its terms, a perpetually renewable lease, and according to the operation of the Law of Property Acts, to agree to create a lease for two thousand years, and therefore to impose a severe hardship on the landlord and his successors-in-title, it is not irrelevant to observe that the agreement was in a form put forward by the agents of the landlord. And it is pertinent also to say that if some of the printed clauses do not fit in perfectly with the typed additions, that again is a matter of which the person putting forward the document (or his successors-in-title) cannot perhaps complain; and certainly it is a matter which one should not over-emphasize in trying to discern from the typewritten language (which was deliberately put in at the time) what the two parties to the document intended.

I now read the following clause in the agreement which is of the essence of the case: "The term shall be for a period of "one year certain from the 25th day of March 1938 the tenant "having the option to renew the tenancy from year to year on "identical terms and conditions as hereinunder stated notice "of such intention to renew the tenancy to be given in writing "on or before December 25 in each year."

It is right that I should mention certain other passages in the document, albeit part of the printed form in the document, which it is said by counsel for the plaintiff throw considerable light on the real intention as these parties have expressed it. For example, in sub-cl. (*f.*) of cl. 2, which sets out the tenant's covenants, it is provided that the tenant shall "permit "prospective tenants or purchasers to view the house and "premises at reasonable times of the day during the last "six months of the tenancy and to allow the landlord or his "agents to erect and maintain any notice boards they may "wish to place on the premises during the same period"; and it is pointed out by counsel for the plaintiff how ill does that fit with the operative part which I have read from cl. 1, whereby until three months before the end of any given year the landlord will not know whether the term he intended to create—leaving aside the effect of the statute—was or was not coming to an end, for so far as the language of the document is concerned, he can never at any time know the answer to that question unless, of course, the tenant tells him, and he has reason to rely on and to accept what he is told. Further, the landlord's covenants include an unrestricted obligation on the landlord: "To keep the structure outer walls roof and exterior drainage "system of the house in good repair and condition and to "paint the outside of the premises and buildings as and when "may be reasonably necessary," that obligation corresponding with the tenant's obligation, which is equally stringent, to maintain at all times in good condition the interior of the premises. Finally, there is a covenant against assigning and underletting without the landlord's consent to which the tenant is subjected.

It is argued, bearing in mind all those provisions, that it is manifestly unreasonable to suppose that these two parties were contemplating a term which would go on either in perpetuity or, as the law now, on one view of it, says it will, for two thousand years; that no landlord would undertake to maintain the structure of Hill Farm Cottage for two thousand years, and that no tenant would undertake to keep its interior properly decorated for a similar period of time. I am invited to construe a passage (not part of the printed form, but inserted in type and manifestly, therefore, exhibiting the real intention of this part of the bargain between the two parties) in the light of the other provisions, and to reach a conclusion which will avoid the effects of the Law of Property legislation; and counsel for the plaintiff adds this observation, that it has been in the past the practice of this court, it is said, to lean against construing agreements to constitute perpetually renewable leaseholds. I bear all those matters in mind, but any inclination in my mind to lean against an intention to create a perpetually renewable leasehold must give way to the language which the parties have chosen to use; and I can only tip the balance in a particular direction if I am left in real doubt as to what the parties did intend. In law, manifestly, it is not my function as a judge to substitute for what the two parties have elected to arrange between themselves some other bargain which to my mind might seem a more sensible arrangement. It seems to me, I confess, that the language they have chosen to use really admits of no reasonable doubt that they intended to create what is commonly called a perpetually renewable leasehold. The language used includes the phrase " the option to renew the tenancy from " year to year," and it says further that notice of that intention is to be given on or before December 25 " in each year." Those seem to me to be very strong indications that what was in the minds of these parties was that, so long as the tenant exercised his option within the time stated, he could go on from year to year ad infinitum renewing his tenancy.

The case is, in my judgment, similar in many ways to the case which came before the Court of Appeal in 1922 of *Gray* v. *Spyer* (1). The agreement which the court then had to construe is set out at length in the report. I am not saying, of course, that the language of the two documents is so close that the decision in *Gray* v. *Spyer* (1) governs altogether the decision in this case—the agreements in the two cases are quite different—but the decision is of assistance to me, I think, as illustrating the point that you cannot reject words which obviously were intended, when they were inserted in the document, to express or reflect the intentions of the parties merely in order to avoid a result which may not be regarded as convenient or reasonable. In the case of *Gray* v. *Spyer* (1) there was, as here, the phrase " year to year "—a right to continue the tenancy from year to year—and the learned judge, who heard the case in the court below, on those words had come to the conclusion that the real intention of the parties was to create what is known to lawyers as a term of art, namely, a yearly tenancy, or a tenancy from year to year ; and holding that to have been the intention of the parties, he rejected phraseology which would have been, in the eyes of the law, inconsistent with a yearly tenancy. But the Court of Appeal pointed out that passages which appeared to be inconsistent could not be disregarded in that way, and that the duty of the court was to try, after reading the whole document together, to come to a decision as to what was the intention of the parties.

I apply and respectfully follow those instructions in the present case, and I am bound to say that the reference to " tenancy from year to year " was not, in my judgment, intended in this case (any more than it was in *Gray* v. *Spyer* (1))

(1) [1922] 2 Ch. 22.

to relate to the tenancy from year to year, which is a familiar term of art to lawyers; but that, in this case, as in *Gray* v. *Spyer* (1), the intention of the parties, as expressed in this clause, was to create a term of one year certain, and then to give to the tenant the right, to be exercised on or before Christmas Day in every year, to go on renewing that tenancy ad infinitum.

Now prima facie, if that is right so far, the answer to the question propounded here is simple, because a contract creating a perpetually renewable leasehold (and the bargain I have described would clearly fall within that description) has been given the effect, by the Law of Property Act, 1922 (para. 7, sch. 15) of being converted into a contract to create a term of two thousand years. It would therefore appear that, whatever was in the minds of the parties on January 14, 1938 (and perhaps to their surprise) this was a contract by the terms of which the landlord agreed to grant to the tenant a tenancy for two thousand years.

That, however, is not quite the end of the matter, and for this reason. Counsel for the plaintiff has drawn my attention to one other point which is not, I think, free from difficulty, and that is this: The effect of a contract of this kind may be described, in the language of Warrington L.J. in *Gray* v. *Spyer* (1), as being a contract to create a succession of reversionary terms, each for one year certain, provided the requisite notice is given prior to the date stated in each of these terms. If that be an accurate way of expressing the effect of a contract of this kind, then a problem arises by reason of the terms of s. 149, sub-s. 3, of the Law of Property Act, 1925. [His Lordship read the sub-section and continued:] The argument of counsel for the plaintiff is that if the effect of this paragraph of the document is accurately described in the language which I have borrowed from Warrington L.J., then it is a contract to create a series of reversionary terms of one year each, the first starting on March 25, 1939, and going on ad infinitum; and, since the contract is made after January 1, 1926, then at any rate as to all terms starting after January 14, 1959—that is, twenty-one years from the date of the instrument—it is a contract to create a reversionary term or terms which offends against the provisions of the section. That might have the result of avoiding the contract in so far as it purported to create reversionary terms of one year commencing after

(1) [1922] 2 Ch. 22.

January 14, 1959, or it might (and this is the alternative preferred by the plaintiff) avoid the contract altogether.

I confess that at first sight that argument was, to my mind, not unimpressive; but it involves one in this difficulty, that it would appear to create an almost irreconcilable conflict between s. 149, sub-s. 3, of the Act of 1925 and sch. 15 of the Act of 1922; for any contract to create a perpetually renewable leasehold will, according to this way of analysing it, involve the result that it is a contract to create terms commencing more than twenty-one years from the date of the instrument, so that you have one Act saying that perpetually renewable leaseholds shall be converted into terms of two thousand years, and the other Act saying they shall be void altogether.

I should add that, although the Law of Property Act, 1922, was passed in that year, it did not in fact come into operation until the same time, namely, January 1, 1926, as the Act of 1925 came into operation. That last consideration, I think, perhaps emphasizes the point that all this property legislation must be construed together; and obviously a result which would make the sections to which I have referred mutually conflict must be avoided, unless there is no escape from that conclusion. Quite plainly it would need very strong and imperious language to compel a court to hold that notwithstanding the elaborate provisions of the part of the Act of 1922 which I have mentioned, all contracts to create perpetually renewable leaseholds are altogether avoided by the section which I have read from the Act of 1925. In order to avoid that result, counsel for the plaintiff then falls back on this final point. He says that these contracts to create perpetually renewable leaseholds fall into two classes, one class in which the option to renew is found exclusively in the original contract, and the other class in which the option to renew is by reference read into, so as to become part of, the successive terms or interests which are from time to time created.

By way of illustration of the second class, but not for any other reason, he referred to *Green* v. *Palmer* (1) where the formula was found "the option of continuing the tenancy "for a further period of six months on the same terms and "conditions 'including this clause'"; and it is, no doubt, within the knowledge of all of us that that formula is one which, in various guises, occurs in renewable leases. If the case

(1) [1944] Ch. 328.

falls within that class, counsel for the plaintiff concedes that, since you are contemplating, notionally, at any rate, a series of separate and exhaustive agreements following one upon the other, you are never really in the position in which you have a contract to create a term commencing at some very distant date.

The other class of case is illustrated, as was argued by counsel for the plaintiff, by this case and by *Gray* v. *Spyer* (1), in which the right to renew is not incorporated in the renewed term, but remains as part of the original document. In this instance, that point, as he contends, is particularly emphasized by the use of the word " hereinunder "—" the tenant having the option to " renew the tenancy from year to year on identical terms and " conditions as hereinunder stated." His argument is that it is only if the contract to create a perpetually renewable leasehold falls into this latter class that it is struck at by s. 149 of the Act of 1925, and is not converted, by para. 7 in sch. 15 to the 1922 Act, into a contract to create a term of two thousand years. And he finds, in paras. 5 and 7 of that schedule, reservations which have the effect, according to the argument, that they do not save a contract for a perpetually renewable leasehold, which is invalid by virtue of some other provisions of the law of the land for the time being—for example, that it involves the creation of reversionary terms commencing more than twenty-one years from its date. The argument is one which I feel I must reject. My own inclination is to say that the answer to it is the simple one, namely, that reading the two Acts together, the case of a perpetually renewable leasehold, though there may be some variation in its form, prima facie, at any rate, is not comprehended by s. 149 of the Act of 1925 at all ; and I think the very fine distinction drawn between the two classes of case should not have the effect of bringing one class within the purview of s. 149 and of keeping the other out of it.

Mr. Danckwerts suggested another answer which is, perhaps, another way of putting the same thing—that if you have here a contract for a perpetually renewable leasehold (and therefore covered by para. 7 of sch. 15 to the Act of 1922) then it is converted into a contract to grant a term of two thousand years, and in that guise and in that form is plainly outside the ambit of s. 149. As I say, I think that may be another way of expressing the point which appeals to me, namely, that reading these provisions together, one should construe s. 149 as not covering, and as not being intended to cover, contracts which may fairly be described as contracts to create perpetually renewable leaseholds, which are intended to be covered, and are covered, by the paragraph I have mentioned in sch. 15 to the Act of 1922. In my opinion that is the correct answer to give to counsel for the plaintiff, conceding in his favour the point of construction which he urges founded on the use of the words " hereinunder stated." I add, however, that I am not wholly satisfied that the use of that somewhat peculiar and inelegant expression has the effect of limiting the terms of the renewed tenancy only to such of the conditions of the original lease as are contained in the subsequent or later parts of the document. Even if they are—even, therefore, if the option to renew is not to be found in the successive terms—I reach the conclusion, for the reasons I have given, that nevertheless the contract is a contract for the grant of a perpetually renewable lease as described, and as intended to be described, by para. 7, of the schedule to the Act of 1922, and, being so described, it is not within the ambit of sub-s. 3, of s. 149 of the Act of 1925.

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(1) [1922] 2 Ch. 22.

I therefore hold that the effect of this contract was to create a tenancy for a term of two thousand years from March 25, 1938, in favour of the tenant ; and, I answer the question raised in the summons accordingly, merely adding finally that no other relief save an expression of the court's view on the question of construction is or can be sought in this summons.

Solicitors : *Ashurst, Morris, Crisp & Co. ; Sharpe, Pritchard & Co., for Penny & Thorne, Berkhamsted.*

J. L. D.

M. W. INVESTMENTS, LIMITED v. KILBURN ENVOY, LIMITED.

VAISEY J.
1946
Oct. 15, 25.

Landlord and tenant — Lease — War-time lease — Option — Validity —Effect of emergency legislation on exercise of option—Validation of War-time Leases Act, 1944 (7 & 8 *Geo.* 6, *c.* 34), *s.* 1, *sub-ss.* 1, 6.

The lessee under a lease, dated February 10, 1942 " for a term " of three years from January 5, 1942, or for a period covering the " duration of hostilities between Great Britain and Germany and " Italy and twelve months after the termination of hostilities " whichever period shall be the longer subject to the extension of " such period as provided " therein, purported to exercise an

VAISEY J.

1946

M. W. INVESTMENTS, LD. *v.* KILBURN ENVOY, LD.

option therein contained for the extension of the lease until January 5, 1949:—

Held, that, having regard to the provisions of the Validation of War-time Leases Act, 1944, the lease must be treated as having, in the events which had happened, created a term of ten years from January 5, 1942, determinable by either party by a month's notice in writing given after May 9, 1945, and that the option had never been and never could be exercisable.

ADJOURNED SUMMONS.

By a lease, dated February 10, 1942, and made between M. W. Investments, Ld. and Kilburn Envoy, Ld., certain property was demised to Kilburn Envoy, Ld. "for the term of "three years from January 5, 1942, or for a period covering the "duration of hostilities between Great Britain and Germany "and Italy and twelve months after the date of the termination of hostilities whichever period shall be the longer "subject to the extension of such period as provided by cl. 5 (4.) "hereof" at the yearly certain and contingent rents and insurance rent therein stated. By cl. 5 (4.) it was provided: "If the term of this lease shall not extend for a period "of seven years from the said January 5, 1942, and the "period of seven years from the said January 5, 1942, and the "lessee shall be desirous of continuing the term for a full "period of seven years from such date and of such desire shall "give not less than three calendar months notice in writing "prior to the expiration of the term granted by this lease then "the lessor will grant a further term up to January 5, 1949, "at a yearly rent equivalent to the highest aggregate certain "and contingent rents paid under cl. 1 hereof in any year during "the term of this lease and insurance rent but otherwise upon "the same terms and conditions as are herein contained except "this present clause."

By a notice in writing, dated December 4, 1945, Kilburn Envoy, Ld. purported to exercise the option by requiring the lessors to grant a further term under the lease up to January 5, 1949.

Doubts having arisen whether the option was exercisable, having regard to the provisions of the Validation of War-time Leases Act, 1944, a summons was taken out by M. W. Investments, Ld., to determine the effect of the lease and of the purported exercise of the option.

Gray K.C. and *Mulligan* for the plaintiffs.

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1946

M. W. INVESTMENTS, LD. *v.* KILBURN ENVOY, LD.

The tenant, as a result of the statute, is not entitled to the extension of his lease to 1949. The option ceased on August 3, 1944, the date on which the statute came into force. The statute was passed as a result of the decision in *Lace* v. *Chantler* (1). This lease comes within s. 1, sub-s. 2 (*b*) of the statute (2). Under the statute the lease has become a lease for ten years determinable on either side by one month's notice. [Counsel read s. 1, sub-ss. 3 and 4, and s. 3 (*c*).] The provision for the duration of the tenancy is utterly inconsistent with the nature of the tenancy as imposed by the statute. The option, therefore, does not arise, because it only arises if the lease does not extend to ten years. The effect of the statute is to abolish cl. 5 (4.) of the agreement as being inconsistent with the provisions of the statute. The statute, in effect, regards the present position in respect of leases of this kind as one of absolute chaos and its intention is to bring them into line and to make them all work out in the same way. An additional reason for disregarding the option is that, if the statute had not been passed, the whole lease would have been void under *Lace* v. *Chantler* (1). The intention of the parties cannot be considered, because, so far as they were concerned, the lease was mere waste paper. The option has not been revived by the statute, but something has been substituted for it. [They also referred to *Hawtrey* v. *Beaufront* (1).]

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(1) [1944] K. B. 368.

(2) By Validation of War-time Leases Act, 1944, s. 1:

Sub-section 1: " Subject to the " provisions of this section, any " agreement, whether entered into " before or after the passing of this " Act, which purports to grant or " provide for the grant of a tenancy " for the duration of the war shall " have effect as if it granted or " provided for the grant of a " tenancy for a term of ten years, " subject to a right exercisable " either by the landlord or the " tenant to determine the tenancy, " if the war ends before the expiration of that term, by at least " one month's notice in writing " given after the end of the war."

Sub-section 2: " In this section " the expression ' the duration of " ' the war,' in relation to any " agreement, means a period " which, on the proper construction of the words used in the " agreement whatever they may " be, ends with, or within a specified time after, one of the following events— . . . . (*b*) the end " of the war or of hostilities as " respects any particular state or " states or any particular theatre " or theatres of war. . . ."

By St. R. & O. 1945, No. 703/L. 8: " For the purposes of the construction of any tenancy agreement, the ninth day of May, " 1945, shall (unless the context requires or it is shown by " admissible evidence that the " agreement should be otherwise " construed) be treated as the date " of the end of the war and of " hostilities as respects each and " all of the states in Europe with " which His Majesty has been at " war at any time since the third " day of September, 1939 . . . ."

Charles R. Russell for the defendants, Kilburn Envoy, Ld. The option is not a nullity or dead. Even if the lease was void, nevertheless, while the parties were acting as if it was valid, there was the relation of landlord and tenant under some form of tenancy. There was nothing, under the law before the passing of the Act, to kill the option, so long as the relation of landlord and tenant existed. The plain purpose of the Act is to uphold every aspect of one of these agreements, except for the substitution of a term certain for a term uncertain. This option was validly exercised. It did exist and nothing has happened to invalidate its exercise in 1945. If and when the existing term is determined, the option bears fruit and the landlord is bound to grant a further term up to January, 1949, at a new rent.

Gray K.C. in reply.

Cur. adv. vult.

Oct. 25. VAISEY J., reading a judgment, said: I must first approach the matter without regard to the Validation of War-Time Leases Act, 1944, and the preliminary question which I think I have to consider is whether this lease, apart from that Act, was valid to any and, if so, what extent. In *Lace* v. *Chantler* (2), it was held by the Court of Appeal that a tenancy " for the duration of the war " did not create a good leasehold interest, on the ground of the uncertainty of the term. In the present case I find a similar uncertainty in " the duration " of hostilities between Great Britain and Germany and Italy." But here there was a term of three years certain, and the habendum was for whichever should be the longer of (*a*) that term and (*b*) something of which the length is either indeterminate or of which length cannot be predicated at all. I am, on the whole, disposed to think that the lessor could not have been heard to say that the lease was not a good lease for the term of three years.

That, however, is only the first step, and I have next to consider what was, or rather would have been, the effect of cl. 5 (4.). Had the provision been merely for the extension of the term at the option of the lessee, I think it might well have been urged that four years could have been added to the original

(1) [1946] K. B. 280.

(2) [1944] K. B. 368.

three years, making seven years certain in all. But the difficulty would have been as to the rents, which are to be the highest aggregate rents paid in any year during the term of the lease, which for this purpose I must regard not necessarily as the three years, but as a term ending either on January 4, 1945, or on the first anniversary of the termination of hostilities between Great Britain, Germany and Italy, whichever of such two dates should be the later. The second of the two dates is, according to *Lace* v. *Chantler* (1), unascertainable, and I therefore come to the conclusion that, apart from the Act, the lease was, or might have been, a good lease for three years, but that no effect could have been given to cl. 5 (4.).

I must now consider the provisions of the beforementioned Act. It received the Royal Assent on August 3, 1944, but, by s. 7, sub-s. 3, it is, subject to s. 3, to which I must presently refer, to be deemed to have had effect in relation to any agreement as from the date on which the agreement was entered into. By s. 1, sub-s. 6, the expression " agreement " in that section was to include an agreement in the form of a lease, and I think the word must be similarly construed in s. 7, sub-s. 3. The Act is entitled : " An Act to validate agreements purporting to " grant or provide for the grant of tenancies for periods " depending on the duration of the war and certain other " events ; to provide for the construction of such agreements " and other tenancy agreements ; and for purposes connected " with the matters aforesaid." I will now read those provisions of the Act which seem to me to be relevant. [After reading s. 1, sub-s.s 1 and 2 his Lordship continued :] So much as I need state of s. 1, sub-s. 3, is as follows : " Any reference in this " section to an agreement purporting to grant . . . . a tenancy " for the duration of the war shall be construed as including a " reference to (*a*) an agreement purporting to grant . . . . " (ii.) a tenancy for a specified term or for the duration of the " war whichever is the longer."

Section 2, sub-s. 2, enacts that His Majesty may by Order in Council declare what date is to be treated for the purposes of any tenancy agreement as (inter alia) the date of the end of hostilities as respects any particular state or states, and s. 2, sub-s. 3, defines " tenancy agreement " in a manner which clearly makes it apply to the lease now in question. [His Lordship then referred to St. R. & O., 1945, No. 703, under which the date of the end of hostilities in Europe was fixed as

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(1) [1944] K. B. 368.

May 9, 1945, and continued :] I need only refer to s. 3, sub-s. 3, which is important, and reads as follows : " Nothing in the " said s. 1 "—that is s. 1 of the Act—" shall affect any provision " of an agreement to which that section applies, being a pro- " vision which does not relate to the duration of the tenancy, " and any such provision shall continue to apply in relation to " the tenancy as it takes effect under that section."

[His Lordship then read the notice of December 4, 1945, relating to the option, and continued :] The substantive question which I have now to decide is whether on the true construction and combined operation of the lease and the Act that option was exercisable at the date of the notice or at any other relevant time. I think that the question is a difficult one. I read s. 3, sub-s. 3, of the Act as indicating (though not in very clear language) that the provisions of the invalid lease should so far as possible survive the process of its statutory validation and should continue to operate as provisions of the hybrid production resulting from the combination of the statutory variations with the terms of the original bargain made or attempted to be made by the parties themselves. Even apart from s. 3, sub-s. 3, I should be disposed to hold that the interference by the legislature with the original bargain was not intended to go further than was necessary to give full effect to the positive provisions of the Act and that every provision of the original arrangement which is capable of standing consistently with such positive provisions ought to continue so to stand. On the other hand, such of the original provisions as contradict or conflict with or are incompatible with the positive provisions of the Act must be rejected, or at any rate modified, when, if, and so far as, they are susceptible of modification. What am I to say of cl. 5 (4.) of the lease ? The Act provides, in effect, that the lease must be treated as having, in the events which have happened, created a term of ten years from January 5, 1942, determinable by either party by a month's notice in writing given after May 9, 1945. I have tried, without success, to reconcile with the altered position of the parties the provisions of cl. 5 (4.), or to modify those provisions with a view to such a reconciliation in some manner short of transforming them into something hardly recognizable, which could not in my opinion be justified. If cl. 5 (4.) had merely empowered, or could be read as merely empowering, the lessee to extend the fixed term of the demise to January 5, 1949, I might have found such reconciliation possible, but the chief trouble, as it seems to me, is due to the provision which it embodies in regard to the rent. I do not find it possible to modify the clause so as to fit it in with its new surroundings.

In my judgment cl. 5 (4.) no longer applies, if it ever did apply, either because it "relates to the duration of the tenancy" within the meaning of s. 3, sub-s. 3, of the Act or because it cannot be fitted into the scheme of what I have called a hybrid production. With some reluctance, and some hesitation also, I feel bound to declare that the option purported to be created by cl. 5 (4.) of the lease has never been and never can be exercisable, and I put it in this way by reason of the particular and unusual terms of s. 7, sub-s. 3, of the Act to which I have already made a reference.

Solicitors: *Harringtons; J. G. Bosman, Robinson & Co.*

J. L. D.

In re ARNOLD, WAINWRIGHT *v.* HOWLETT.

WYNN-PARRY J.

1946

Oct. 23.

Settlement—Power to appoint by deed or will among class—No provision for class in default of appointment—Power not exercised—Devolution—Implication.

By a declaration of trust, dated November 3, 1897, it was agreed that the trustees should stand possessed of certain residuary trust funds of the estate of a testator in trust to pay the income thereof to the daughter of the testator during her life with power for her to appoint that after her decease the whole or any part of such income should be paid to any husband of hers who might survive her and, subject to any such appointment, "in trust for the "children of [the daughter] or any of her issue in such shares "(if more than one) and in such manner as she shall by any deed "or deeds or by her will appoint." The deed also contained a gift over in an event which did not happen. She died in 1944, there being, as a result of her marriage, nine children; and five grandchildren (born in her lifetime). She did not exercise her power of appointment either by deed or by will. A summons was taken out by the trustees to determine how the trust funds became divisible on the death of the daughter, as no provision appeared to have been made for her children or remoter issue in the event of her not having exercised the power of appointment in their favour contained in the deed:—

Held, that the case fell within the second class mentioned by Kindersley, V.-C., in his statement of the general principle set out in *Lambert* v. *Thwaites* (1866) L. R. 2 Eq., at p. 155, and that, on the true construction of the deed, the trust funds became, on the death of the daughter, divisible between all the children and

WYNN-PARRY J.

1946

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remoter issue of the daughter, born in her lifetime, whether living at her death or not, and whether they had attained, or should attain, the age of twenty-one years, or, being female, had married or should marry, or not, in equal shares:

Held, also, that they took per capita and not as joint tenants; and that the law on this point was accurately stated in Hawkins on Wills, 3rd ed., p. 75, under the heading "Tenancy in common."

Brown v. *Pocock* (1833) 6 Sim. 257 not followed.

ADJOURNED SUMMONS.

The facts sufficiently appear in the headnote.

Droop for the plaintiffs.

Teague for three children of the daughter.

Winterbotham for another child of the daughter. The interpretation of this trust is a pure matter of construction. It is necessary to see exactly what the deed says and to attempt to give to each word its proper and natural meaning. The result would be that, on the true construction of the trust, a declaration should be made that the property is now held on trust for the five surviving children of the daughter, jointly. [He referred to *Lambert* v. *Thwaites* (1); *Brown* v. *Pocock* (2), and *In re Llewellyn* (3).]

Wilfrid M. Hunt for the legal personal representative of a child of the daughter who attained twenty-one and died intestate in 1935 and for three other children who died in infancy before January 1, 1926. This is a pure question of construction. This is a case where the appointment was to be by deed or will and the daughter could have, therefore, appointed by deed in her lifetime just as much as by will. There was, therefore, no reason for merely leaving an interest to those who survived her. It is a gift to children and issue in such shares as might be appointed; and remoter issue are included as well as children. The class is closed at the death of the daughter. The further question is whether the class is limited to those who survived her or not. [He referred to *Wilson* v. *Duguid* (4).] The class takes per capita and as tenants in common: see Hawkins on Wills, 3rd ed., p. 75; see also, Farwell on Powers, 3rd ed., p. 539.

E. G. Wright for the infant grandchildren. Remoter issue are included in the class. There is no contingency of attaining twenty-one or marriage. Survivorship is, however, the contingency which must be satisfied. There are many cases where the division has been per capita and the isolated decision of *Brown* v. *Pocock* (1) in favour of a joint tenancy is explained in the judgment in *Lambert* v. *Thwaites* (2).

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(1) (1866) L. R. 2 Eq. 151.

(2) (1833) 6 Sim. 257.

(3) [1921] 2 Ch. 281.

(4) (1883) 24 Ch. D. 244.

WYNN-PARRY J. This summons raises a question of construction in regard to a passage or provision contained in a declaration of trust, dated November 3, 1897. The declaration of trust was brought into existence, in circumstances to which I need not refer in any detail, to evidence a compromise, and having with particularity set out the circumstances leading up to its execution and having made in the operative part certain provisions, to which I need not refer in any detail but which, put shortly, provided for the constitution of what is described therein as the residuary trust funds, and having provided for the payment of the income thereof to one of the parties to the deed, and then for provision of a life interest to her daughter, to whom I will refer as " the daughter " the deed proceeds as follows: [His Lordship read the material provisions of the deed, and continued :] The summons proceeds on the basis of two assumptions. First, that, on the true construction of the provision which I have read, there is nothing undisposed of, i.e., no resulting trust, and no provision made for the children or remoter issue of the daughter in the event of the daughter not having exercised the power of appointment contained in the deed; that the language is sufficiently plain to indicate that either there is a trust in the true sense of the word or a power in the nature of a trust; and that therefore the court will imply a trust for some class of issue. The second assumption on which the matter proceeds is that, whatever the class may be, the class must be considered closed at the date of the death of the daughter. On that basis, certain possibilities are put forward, and I am asked to say which, in my view, is the correct statement of the class in favour of whom the court will imply a trust.

Mr. Winterbotham, who appears for a living child of the daughter, having no children, has argued that on the true construction of this deed there is what the court can properly regard as a gift over. He asks me, first of all, to read the relevant provision without any reference to authority, a request which I, of course, accept as the correct way of approaching the construction of any document, and he says that when

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(1) 6 Sim. 257.

(2) L. R. 2 Eq. 151.

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one reads this provision one can, without doing any violence to the language, extract from it a gift over. The way he puts it is this. He says that the words " in such shares (if more than " one) and in such manner as she shall by any deed or deeds or " by her will appoint " are words which only qualify the immediately preceding words, " any of her issue," and so that the phrase should read " In trust for the children of . . . . " the daughter," as one provision, and, secondly, as a separate alternative provision, " any of her issue in such shares " etc., as I have read. He points out that if the alternative construction is to be adopted and the words " the children of . . . . " the daughter " are to be considered as linked with " any of " her issue " and qualified by the following words, the words " the children of . . . . the daughter " are useless ; but he is constrained to admit that, on his construction, the two separate provisions for which he contends are clearly in the wrong order, and although in certain cases it may not be said to be doing violence to a deed to reverse provisions therein, I feel no doubt in this case that the proper way to read the provision is in such a way as to link the words " the children of . . . . the daughter " with the words " any of her issue " and to treat all those words as qualified by the succeeding words, so that it follows that there is clearly a gap in this document and no provision is made for the children or issue of the daughter in the event of her not exercising the power of appointment and dying leaving such children or issue.

The question then arises : In favour of what class is a trust to be implied ? Now on this point I have what appears to me to be clear guidance in the form of a passage from the judgment of Kindersley V.-C. in *Lambert* v. *Thwaites* (1). The passage is as follows : " The question is whether, in default of execution " of the power, the property is to be divided amongst the six " children who survived the father, excluding Alfred, or among " the seven, including him. In order to determine this question " it is necessary to bear in mind what has now become an elementary principle in the doctrine of powers, although at one " time it was disputed, and indeed held the other way—I mean " the principle that the existence of a power of appointment does " not prevent the vesting of the property until, and in default of, " execution of the power. The exercise of the power will " divest the estate ; but until the power is exercised, it remains " vested in those who are to take in default of appointment.

(1) L. R. 2 Eq. 151, 155.

"That is now perfectly well settled, and has been so ever since "the well-known case of *Doe* v. *Martin* in 1790 (1). But where "the instrument contains no express gift over in default of "appointment, the difficulty is to determine who are to take in "default of appointment. The general principle seems to be "this: If the instrument itself gives the property to a class, "but gives a power to A. to appoint in what shares and in what "manner the members of that class shall take, the property "vests, until the power is exercised, in all the members of the "class, and they will all take in default of appointment; "but if the instrument does not contain a gift of the property "to any class, but only a power to A. to give it, as he may think "fit, among the members of that class, those only can take in "default of appointment who might have taken under an "exercise of the power. In that case the court implies an "intention to give the property in default of appointment to "those only to whom the donee of the power might give it." That statement of the law has, so far as I am aware, stood without criticism ever since, and indeed has from time to time been followed and applied.

Several authorities have been referred to with a view to showing that the present case falls within one or the other of those two classes, but, in the end, it must come back to a question of construction of the particular document and, indeed, that is the course which I am directed to take by the judgment of Tomlin J., in *In re Combe* (2). I therefore turn back on this question to the document. The vital words are "In trust "for the children of . . . . the daughter or any of her issue." I can state my conclusion quite shortly. In my view, it is impossible to spell out of that language a gift of the property to a class, giving only a power to the tenant for life to appoint what shares and in what manner the members of the class shall take, because of the presence of the word "any." It will be seen that, whereas at the beginning of the phrase the language is "In trust for the children of . . . . the daughter," it proceeds "or any of her issue," and that seems to me to result in this case falling within the second of the two classes defined by Kindersley V.-C. in *Lambert* v. *Thwaites* (3).

The question then arises whether those only who survive the tenant for life are entitled to take. It does not appear that there is any direct authority on the question, where a case falls

(1) (1790) 4 T. R. 39.

(2) [1925] 1 Ch. 210.

(3) L. R. 2 Eq. 151.

within the second of the two classes, what will be the effect if, as in the present case, the power of appointment is given so as to be exercisable not only by will but by deed. In my view, it must follow that, where the power is exercisable by deed as well as by will, the result must be to let more persons into the class than would be the case if the right to exercise the power was confined to a will, and, in those circumstances, I hold that in this case there is no contingency on any issue that he or she should survive the tenant for life, nor can I find any indication on the face of the document which requires that any person to become a member of the class should reach the age of twenty-one.

There remains the question whether the members of the class are to take per capita or whether they are to take as joint tenants. Mr. Winterbotham referred me to *Brown* v. *Pocock* (1). The headnote is: "Testatrix gave a weekly "sum to A. for his life or until he should attempt to "assign, etc., the same, and she directed a sum of stock to be "set apart to answer the payments; and she gave to A. the "power of leaving the stock, after the payments to him should "cease, to and for the benefit of his wife and children, as he "should, by will duly executed, give and bequeath the same. "A. died having made an invalid appointment of the stock. "Held that there was an implied gift to his wife and children, "in default of appointment." The Vice-Chancellor in a very short judgment, said: "The codicil contains no express gift "over in default of appointment; but it is clear that the "testatrix intended the wife and children to take the fund, and, "therefore, I am of opinion that there is a gift to them, by "implication, subject to the power. Declare that the sur-"viving children of James Edward Brown are entitled to a "moiety of the stock as joint-tenants."

The question of joint tenancy does not appear to have been argued in that matter. The case, so far as I can see, is an isolated case and in my view it is against the modern trend of authority. I think the true view is accurately stated in Hawkins on Wills, 3rd. ed., p. 75, where, under the heading "Tenancy "in common," Mr. Hawkins says: "It seems that wherever "the rule in *Brown* v. *Higgs* (2) is applied, the objects will take "the property among them as tenants in common, and not as "joint tenants. This is certainly the case if the power be to "divide the property 'amongst' or 'between' the objects

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(1) 6 Sim. 257.

(2) (1799) 4 Ves. 707a.

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" (*Casterton* v. *Sutherland* (1); and in *In re White's Trusts* (2)), " a gift to ' such other of my children or their issue ' as A. " should appoint, was held, in default of appointment, to create " a tenancy in common between all the children and issue. " In fact any power which enables the donee either to *select* " objects, or to fix proportions, seems to contain that reference " to plurality of interest among the objects which is sufficient " to create a tenancy in common." A number of cases were, in the course of the argument, referred to on this point, but I do not think that multiplication of reference to authority in this judgment will advance the matter. In my view, that last sentence is a correct statement of the law as at present administered by this court and I propose to proceed on that basis. In the result, therefore, I propose to declare that " on the true " construction of the declaration of trust the trust funds " subject thereto became on the death of the daughter divisible " between all the children and remoter issue of the daughter " born in her lifetime whether living at her death or not and " whether they have attained or attain the age of twenty-one " years or being female have married or marry or not in equal " shares per capita."

Solicitors: *Snow, Fox & Co.; G. E. Hodgkinson.*

(1) (1804) 9 Ves. 445. (2) (1860) Johns. 656.

J. L. D.

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Oct. 16, 17, 25.

Medicine—Regulation of retail sales—" Substance recommended as a " medicine "—Prohibition of sale by retail except by authorized persons—Description on label or wrapper—Sale of article under " proprietary designation "—Complete set of words associating article with proprietor—Pharmacy and Medicines Act, 1941 (4 & 5 *Geo.* 6, *c.*42), *ss.* 11, 12, 17.

The Pharmacy and Medicines Act, 1941, amending the Pharmacy and Poisons Act, 1933, by s. 12 prohibits the sale by retail of any article containing or comprising a " substance recommended for " use as a medicine," except by " authorized persons " which includes registered pharmacists carrying on business as retail druggists and medical practitioners. But it is a defence to any prosecution of a person charged with selling in contravention of this section for him to prove that the sale was effected at a shop and the article was sold under a proprietary designation.

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Held (1.) that " senna pods " when sold in packages bearing only the name of the article, and that of the person or firm packing and selling them was not a substance recommended for use as a medicine.

(2.) That " lemon and squill linctus " when sold in bottles bearing the maker's name was a substance recommended for use as a medicine, " linctus " being generally known as a word meaning " cough medicine."

(3.) That the following articles, when sold in packages, bottles, or other containers, bearing the name of the makers or vendors, with directions for dosage, etc., were all substances recommended for use as medicines, namely—Fluid extract of cascara sagrada, compound rhubarb pills and effervescing powders, described as substitutes for seidlitz powders.

(4.) That an article described as " All Fours Chest and Lung " Mixture " followed on the label by the name of the firm preparing it was not sold under a proprietary designation within the meaning of the Act, but that " Pritchard's All Fours Chest and Lung " Mixture " was such a proprietary designation, and therefore could be sold in a shop by other than an authorized person.

ADJOURNED SUMMONS.

The summons was taken out by the plaintiffs who were wholesale druggists, and the Pharmaceutical Society of England, as the body entrusted with the duty of enforcing the provisions of the Pharmacy and Medicines Act, 1941, under s. 15 thereof were made respondents to it. The object of the proceeding, which was of a friendly character, was to obtain a decision of the court on the proper construction and effect of certain sections of the Act, and particularly the meaning of the words " substance recommended as a medicine " in ss. 11 and 12, and " sold under a proprietary designation " in s. 17 of the Act. The summons asked (1.) whether certain articles mentioned in the first schedule thereto and fully described in the judgment were " substances recommended " as a medicine " within the Act, and (2.) whether an article known as " All Fours Chest and Lung Mixture " made and sold by three different chemical firms in Lancashire and Cheshire was or was not, according to the label on the bottle, an article sold under a proprietary designation. The arguments turned entirely on the facts, and are sufficiently referred to in the judgment.

Glyn-Jones K.C., *G. G. Honeyman* and *R. P. Colinvaux* for the plaintiffs.

Blanco White K.C. and *Holroyd Pearce K.C.* for the respondents.

Cur. adv. vult.

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Oct. 25. WYNN-PARRY J. This is a summons taken out by the plaintiffs under the Pharmacy and Medicines Act, 1941, against the Pharmaceutical Society of Great Britain, who under s. 15 of the Act have the duty to take all reasonable steps to enforce the provisions of, inter alia, s. 11 of the Act, as defendants. The object of the proceeding, which is friendly in character, is to obtain from the court a construction of certain provisions of the Act, which are said to have given rise to difficulty.

The Act is described as : " An Act to amend the Pharmacy " and Poisons Act, 1933, to prohibit certain advertisements " relating to medical matters, and to amend the law relating " to medicines." The provisions of the Act with which I am concerned are portions of ss. 11 and 12 which fall under the heading " Medicines," and sub-s. 1 of s. 17, the definition section (1). Question 1 of the originating summons is in these

(1) The Pharmacy and Medicines Act, 1941, provides, so far as material as follows. Section 11 : Subject to the provisions of this Act, no person shall—(*a*) sell by retail any article consisting of or comprising a substance recommended as a medicine ; . . . . (*b*) . . . . unless there is written so as to be clearly legible on the article or a label affixed thereto . . . . or . . . . on the container or a label affixed thereto (i) the appropriate designation of the substance so recommended, or of each of the active constituents thereof, or of each of the ingredients of which it has been compounded ; and (ii) in a case where the appropriate designation of each of the active constituents or the ingredients is written as aforesaid, the appropriate quantitative particulars of the constituents or ingredients. By sub-s. 2 : In the preceding sub-s.—(*a*) the expression " appropriate designation," in relation to a substance, constituent or ingredient, means :—(i) in a case where the substance, constituent or ingredient is a poison included in the Poisons List, the name with which the container of the poison is for the time being required to be labelled in pursuance of para. (*c*) of sub-s. 1 of s. 18 of the principal Act ; (ii) in a case where the substance, constituent or ingredient is not such a poison and is described in any of the monographs contained in the edition of the British Pharmacopœia or the British Pharmaceutical Codex which was last published before the date on which the article was sold or supplied, the description set out at the head of that monograph ; (iii) in a case where the substance, constituent or ingredient is not such a poison and is not so described, the accepted scientific name, or other name descriptive of the true nature, of the sub-

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terms: "Whether upon a true construction of the Pharmacy "and Medicines Act, 1941 (and on the agreed facts of this case)

stance, constituent or ingredient; (*c*) the expression "container" includes a wrapper.

Section 12: (1.) Subject to the provisions of this Act, no person shall sell by retail any article consisting of or comprising a substance recommended as a medicine unless he is—(*a*) a registered medical practitioner or a registered dentist . . . . (*c*) a person . . . . who (i) has served a regular apprenticeship to a registered pharmacist, or to a body corporate authorized to sell poisons . . . . and (ii) is at the date of the passing of this Act carrying on on his own account a business which comprises the retail sale of drugs . . . . (5.) It shall also be a defence for a person charged with selling in contravention of sub-s. 1 or sub-s. 2 of this section an article consisting of or comprising a substance recommended as a medicine to prove that the sale was effected at a shop and that the article was sold under a proprietary designation.

Section 17 (1.): In this Act the following expressions have the meanings hereby respectively assigned to them:—"advertise-"ment" includes any notice, circular, label, wrapper, or other document, and any announcement made orally or by some means of producing or transmitting light or sound . . . . "proprietary "designation," in relation to the sale of an article consisting of or comprising a substance recommended as a medicine, means a word or words used in connexion with the sale of articles consisting of or comprising the substance for the purpose of indicating that they are the goods of a particular person by virtue of manufacture, selection, certification, dealing with or offering for sale; and the expression "proprietor," in relation to such a designation means the person whose goods are indicated or intended to be indicated as aforesaid by the designation . . . . "substance recommended as a "medicine" in relation to the sale of an article consisting of or comprising a substance so recommended, means a substance whcih is referred to: (*a*) on the article, or on any wrapper or container in which the article is sold, or on any label affixed to, or in any document enclosed in, the article or such a wrapper or container; or (*b*) in any placard or other document exhibited at the place where the article is sold; or (*c*) in any advertisement published after the passing of this Act by or on behalf of the manufacturer of the article, or the person carrying on the business in the course of which the article was sold, or in a case where the article was sold under a proprietary designation, the proprietor of the designation; in terms which are calculated to lead to the use of the substance for the prevention or treatment of any ailment, infirmity or injury affecting the human body.

By sub-s. 2: For the purposes of this Act (*a*) an article shall be deemed to be sold under a designation or title if, but not unless, the designation or title is used for naming the article or the substance which it consists of or comprises (i) by any person in connexion with the sale; or (ii) on the article, or on any wrapper or container in which the article is sold, or on any label affixed to, or in any document enclosed in, the article or such a wrapper or container.

" any and which of the substances specified in the first column " of the first schedule hereto when sold in a wrapper or container labelled as described opposite each in the second " column of the said schedule are substances recommended " as a medicine." The object of that question is to obtain by reference to the selected substances and the manner in which they are labelled, guidance as to the meaning and effect of the phrase used in ss. 11 and 12 of the Act, and defined in s. 17, namely, " substance recommended as a medicine."

The first substance is senna pods. The effect of the agreed evidence on this substance is as follows : " Senna pods consist " of the dried ripe fruits of Cassia acutifolia (Egypt) or Cassia " angustifolia (India) . . . . When purchased by retail " customers senna pods are purchased only for the purpose of " making an infusion which is used as a laxative or purgative " for which purpose their use is well known to the public. " They are not . . . . used for veterinary purposes. When " sold by the plaintiff company they are sold in paper packets " to which are gummed labels in the following form : In the " middle appear the words ' senna pods,' and below under two " ruled lines the legend ' Potter & Clarke, Ld., Viaduct House, " ' Farringdon Street, London, E.C.4.' "

The question, therefore, which I have to consider is whether, when senna pods are sold in a wrapper or container bearing a label in the form to which I have referred, they are substances recommended as a medicine, within the meaning of that phrase as used in the Act.

It is to be observed in the first place that the prohibition in s. 11 (that in s. 12 is in similar terms) is not against the sale of medicine simpliciter—indeed, the term " medicine " is not defined in the Act—but against the sale of any article consisting of or comprising a substance recommended as a medicine. Looking for the moment no further than those two sections, it appears to me to follow as a matter of construction that a sale does not contravene the Act, unless it can fairly be said that in some form or another there is a recommendation of the substance as a medicine ; whether or not the substance is in fact a medicine appears to me to be wholly irrelevant. In my judgment, this construction is borne out by a consideration of the definition of " substance recommended " as a medicine " in s. 17. From this definition it appears clearly that before a substance can be regarded as a " substance " recommended as a medicine," it must be referred to on the container (to take one example) in terms which are calculated to lead to its use for the prevention or treatment of an ailment affecting the human body. The word "calculated" as used in that definition, of course includes the sense in which it is frequently used, namely, "likely." In every case requiring consideration under s. 11 or s. 12 of the Act, therefore, the question appears to me to be reduced to this: Whether, having regard to the terms of the document or announcement by which reference is made to the substance, and having regard to the circumstances, properly to be taken into consideration in the light of the established rules of construction, those terms can fairly be said to be "calculated to lead to the use of the "substance for the prevention or treatment of any ailment ". . . . affecting the human body."

Turning again to the label, and applying the above principle, I can find nothing in the terms by which reference is made to the substance, which of themselves could fairly be said to be calculated to lead to the use of senna pods for the prevention or treatment of any ailment; because, as I have already indicated, apart from the name and address of the plaintiffs, the vendor, the label contains nothing but the words: "senna "pods," which are no more than a bare, but accurate, identification of the contents. I therefore conclude that there is nothing on the face of the label which amounts to a reference to the substance in terms which are calculated to lead to its use for the prevention or treatment of any ailment . . . . affecting the human body.

It has, however, been argued on behalf of the defendant society that in view of the evidence that, "when purchased by "retail customers senna pods are purchased only for the "purpose of making an infusion which is used as a laxative or "purgative for which purpose their use is well known to the "public," it follows that to place the words "senna pods" on the label, and nothing more, necessarily amounts to a recommendation of senna pods within the Act. I do not accept this reasoning. The words "senna pods," taken by themselves, contain no recommendation of any description. If therefore, a person buys a packet labelled "senna pods" for use as a laxative, he does so, not because of any recommendation on the label that senna pods are useful as a laxative (for the label is silent on that point) but because of a further circumstance, namely, his knowledge, not in any degree acquired from a perusal of the label, but aliunde, that senna pods are useful as a laxative. So far, therefore, as senna pods are concerned, I answer question 1 of the originating summons in the negative.

The next substance is "Fluid extract of cascara sagrada." The effect of the agreed evidence on this substance is as follows: "Fluid extract of cascara sagrada is an extract of "cascara sagrada which is prepared with distilled water and "preserved with alcohol. One fluid ounce of the extract "represents one ounce of the original drug. Cascara sagrada "is the dried bark of rhamnus purshiana, collected and "dried, the collection being made at least a year before use. "It is a popular mild laxative acting principally on the large "intestine . . . . When purchased by retail customers "cascara is purchased for human use as a laxative. When "sold by the plaintiff company, fluid extract of cascara "sagrada is sold in bottles bearing a label in the following "form: First appears the trade mark of the vendor, and "then are these words: 'Fluid extract of cascara sagrada,' "underneath that, 'British Pharmacopœia,' and below that, "'Dose, Half to one teaspoonful in half a wineglassful of "'water'."

Here, therefore, the question which I have to consider is whether, when fluid extract of cascara sagrada is sold in a bottle bearing a label in the form to which I have referred, it is a substance recommended as a medicine, within the meaning of that phrase as used in the Act. This case appears to me to stand on a different footing from the previous case. In my view, the label which I have read contains words which are clearly calculated to lead a purchaser to purchase the bottle for the sole purpose of preventing or treating an ailment . . . . affecting the human body.

The two strong pointers which support this view, are first the reference to the British Pharmacopœia, and secondly the reference to the dosage. The reference to the British Pharmacopœia informs the reader that the particular extract of cascara sagrada, in accordance with which the contents of the bottle have been prepared, is the subject of a monograph in the relevant edition of the British Pharmacopœia, while the reference to dosage makes it clear beyond doubt that the contents of the bottle are offered for sale for no other purpose than, broadly speaking, as a medicine. It has, however, been argued on behalf of the plaintiffs that the true construction of the definition of the phrase "substance recommended as "a medicine" contained in s. 17 of the Act, demands that the terms in which the substance is referred to, should be fairly calculated to lead to the use of the substance for the prevention or treatment of some particular ailment, infirmity or injury, or of some particular group of ailments, infirmities or injuries, affecting the human body. In support of this contention, I was referred to a passage from the judgment of Atkinson J. in *Nairne* v. *Stephen Smith & Co. and the Pharmaceutical Society of Great Britain* (1) where the learned judge said this: " It " is said on behalf of the defendant company that the words " 'any ailment' mean some specific ailment, or, at any rate, " that there must be something specific about the claim that " the substance in question will be of benefit. I think that is " right." I respectfully agree with the view of Atkinson J. that on the true construction of the definition, the reference must be to some particular ailment—or group of ailments—affecting the human body.

This does not, however, conclude the question. As I have said, the terms of the label in question make it clear that the contents of the bottle are offered for sale as a medicine. Now the effect of the evidence is that retail customers always purchase cascara for human use as a laxative. In other words, it is common knowledge that cascara is a laxative. Now it is one thing to place on the label nothing more than an accurate description of the contents of a packet or container—a set of circumstances which I have had to consider in the case of senna pods—where no words of recommendation are used: it is quite another thing to use words which, properly construed, recommend the contents for use as a human medicine. In the first case, one never reaches the area of recommendation. In the second case, there is the clearest recommendation. In the first case the recommendation being entirely lacking, it is in my judgment inadmissible to introduce evidence of public knowledge to supply the complete absence of recommendation. But in the second case, as the recommendation appears on the face of the label, it is proper to admit the evidence of public knowledge of the use of the substance to identify the recommendation with a particular ailment or group of ailments . . . . affecting the human body. To do otherwise would be, in my judgment, to shut one's eyes to the clear facts of the matter. As regards fluid extract of cascara sagrada, therefore, sold under this label, I answer question 1 of the originating summons in the affirmative.

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(1) [1943] K. B. 17, 22.

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The third substance is "lemon and squill linctus." The effect of the agreed evidence on this substance is as follows: "Lemon and squill linctus is a preparation which . . . . the "public purchase only for the treatment of coughs for which "purpose the public know it to be suitable. A linctus is "a liquid preparation of a mucilaginous, syrupy or viscous "nature composed of substances which have demulcent "expectorant or sedative properties, and is used in the treatment of coughs. In addition to its many well-known uses, "lemon is regarded as a popular remedy for coughs. Squill "is the dried bulb of Urginea scilla and is used as an "expectorant in the treatment of coughs. When sold by the "plaintiff company, lemon and squill linctus is labelled with "a label which reads as follows: First appear the words "'lemon and squill linctus' and then under two ruled lines, "the name and address of the plaintiffs." In the course of the argument, Mr. Glyn-Jones, for the plaintiffs, was constrained to admit, rightly as I think, that in view of that evidence, linctus must be regarded as equivalent to "cough "medicine," and the label, therefore, as equivalent to "lemon "and squill cough medicine," and thus that he could not succeed on this part of the question. Consequently, so far as lemon and squill linctus is concerned, I answer question 1 of the originating summons in the affirmative.

The fourth substance is compound rhubarb pills. The effect of the agreed evidence on this substance is as follows: "Compound rhubarb pills contain rhubarb as the principal "ingredient. Rhubarb is the dried rhizome of various species of "Rheum, and is a well-known household remedy as a vegetable "laxative. Pills are any smallish round body and for medical "and veterinary purposes are prepared by incorporating "medicaments with suitable bases and are shaped to a convenient size and form for swallowing. When sold by the "plaintiff company compound rhubarb pills are sold in a box "to which is gummed a label in the following form:—Round "a photograph, in the centre, of the head and shoulders of "a man, who is unidentified, appear the words: 'Compound "'rhubarb pills'; the lower part of the circle is taken up "with the words 'Parkinson, Ld., Birmingham.' On the "left-hand side appear the words: 'Dose: one or two' and "on the right-hand side, 'at bed time'."

Thus the question which I have now to consider is whether, when pills composed as stated in the evidence, are sold in a box bearing a label in the form to which I have referred, each pill is a substance recommended as a medicine, within the meaning of that phrase as used in the Act. This case appears to me to stand on the same footing as the case regarding fluid extract of cascara sagrada. The words "compound rhubarb pills" indicate that the box contains a preparation in the form of pills, of which the chief ingredient is rhubarb. "Pills" indicates of itself that the substance is offered as a medicine; this circumstance is emphasized by the words: "Dose: "one or two at bed-time," while the words, "at bed-time" indicate beyond any reasonable doubt that the substance is put forward as a medicine for human consumption, and therefore for the prevention or treatment of an ailment or ailments . . . . affecting the human body. It is true that no express reference is made on the label to the ailment or group of ailments for which it is recommended; but in my view, the same reasoning which I have adopted in the case of fluid extract of cascara applies in this case. Therefore, as regards compound rhubarb pills, I answer question 1 of the originating summons in the affirmative.

The last substance is effervescing powders. The effect of the agreed evidence on this substance is as follows: "Effervescing powders were sold by the plaintiff company "during the war in packages each wrapped with a label. "These effervescing powders consist of a blue paper con-"taining exsiccated magnesium sulphate (11.25 grammes) "and bicarbonate of soda (2.5 grammes) and a white paper "containing tartaric acid (2.5 grammes). The powders "dissolved in a tumbler of water form an effervescent saline "aperient . . . . When purchased by retail customers the "said effervescing powders were purchased as a war-time "substitute for seidlitz powders when the ingredients for "seidlitz powders were not readily available. Seidlitz powder "is a well-known mild purgative in which the contents of the "blue paper are Rochelle salt and bicarbonate of soda, the "contents of the white paper tartaric acid, and the method of "preparation for use is the same" as in the case of these effervescing powders. The label is in the following form: On the front appear the words in bold lettering: "Extra "Strong Effervescing Powders." Between the two sets of words appear the words: "Prepared by Carter & Sons, "Sheffield," and at the foot, the phrase: "A war-time "substitute for seidlitz powders." On the back of the label appear the words in bold lettering: "Carters, Sheffield," between which words are set out the directions for use in the following terms: "Dissolve the contents of the blue paper 'in half a tumbler of water, then add the powder in the ' white paper, and drink while effervescing. Take first thing " in the morning on an empty stomach."

Here, therefore, the question which I have to determine is whether, when powders composed as stated in the evidence, are sold in a package bearing a label in the form to which I have referred, the powders are a substance recommended as a medicine within the meaning of that phrase as used in the Act. This case appears to me to be an even stronger case than the case regarding fluid extract of cascara sagrada. The use of the word "powders" indicates that the contents are offered as—broadly speaking—a medicine, while their description as a war-time substitute for seidlitz powders is tantamount to describing them as having the same effect and being offered for the same use as seidlitz powders; that is, the description is equivalent to describing them as a mild purgative. Finally, the direction: "Take first thing in the morning on an empty stomach" makes it clear that they are offered for human consumption. Therefore, as regards "effervescing powders" of the type mentioned in the first schedule to the originating summons, I answer question 1 of the originating summons in the affirmative.

Question 2 of the originating summons is in these terms: "Whether upon a true construction of the said Act (and on "the agreed facts of this case) the substance known as All "Fours Chest and Lung Mixture and manufactured by the firm "or companies specified in the first column of the second "schedule hereto is in any and if so what case sold under "a proprietary designation when sold in bottles labelled as "described opposite each in the second column of the said "schedule." The object of that question is to obtain by reference to the selected labels guidance as to the meaning of the phrase "proprietary designation" used in s. 12, sub-s. 5 of the Act, where it is provided that it is to be a defence for a person charged with selling in contravention of sub-s. 1 or sub-s. 2 of that section, an article consisting of or comprising a substance recommended as a medicine to prove that the sale was effected at a shop and that the article was sold under a proprietary designation.

The word "designation" is defined in Webster's Dictionary in its third sense as: "That which designates; a distinguishing mark or name: distinctive title; appellation." In my view it is in this sense of distinctive title or appellation that the word is used in the Act. It follows that (putting aside the case of a single word amounting to a proprietary designation, which must be a rare case) where a set of words are said to amount to a proprietary designation, it must first be possible to say of them that on a fair construction, and having regard to the context in which they appear, they are to be read together, and secondly that when they are read together, they form a distinctive title or appellation. Thus "Beecham's Pills" amounts to a designation, while "Pills—manufactured by Beechams" does not amount to a designation. Further, in order to come within the phrase under consideration, "proprietary designation," the set of words must contain as part of the designation words indicating that they are the goods of a particular person by virtue of manufacture, selection, certification, dealing with, or offering for sale. It follows in my view that it cannot be said of the first two labels that they contain a proprietary designation, for in each case the description of the substance, "All Fours Chest and Lung Mixture" is separated by a statement of the price and directions as to dosage, and in the first case by a statement of the formula, from the name of the manufacturer. This appears to me to be fatal to the plaintiffs' contention as regards these two labels. For a set of words to amount to a designation, they must be continuous, or at any rate, intended by necessary implication to be read together. In the case of neither of the first two labels are either of those conditions present. As regards the substances sold under these first two labels, therefore, I propose to answer question 2 of the originating summons in the negative.

The remaining label presents a little more difficulty. The description on the front of the bottle is "Pritchards' Extra Strong All Fours Chest and Lung Mixture"; and the question arises; how many of those words are to be regarded as part of a designation. If the whole of them, then in my view the designation is a proprietary designation within the meaning of that phrase as defined in s. 17, because the substance is designated, and as part of the designation the word "Pritchards" is used to indicate that the substance is that of Pritchards, Ld. by manufacture. It is to be observed that the word "Pritchards" is separated from the words: "All Fours

"Chest and Lung Mixture" by the words "Extra Strong." The words "Extra Strong" are words which indicate the quality of the substance, but I can see no reason for holding that a manufacturer is not entitled to use such words as part of the designation under which he sells his product, any less than other words of description, such as Dr. Mackenzie's "One Day "Cold Cure," or somebody else's "Lightning Headache Cure." If, as I assume to be the case, Messrs. Pritchards, Ld. consistently sell their preparation under these words: "Pritchards' Extra Strong All Fours Chest and Lung Mixture," they are entitled to claim that those words are all part of the designation under which they sell. I have given consideration to the different wording on the side of the label, which reads: "Pritchards' All Fours Extra Strong." It may be said that this arrangement of the words shows that the words "Extra "Strong" do not in fact form part of the designation. I think, however, that to accept this argument would involve taking too narrow a view of the matter. From the point of view of attractiveness of the label, it would not be practicable on the side of the label to follow the same order of words as on the front of the label. It would be truer to say that there are two designations, each of which is proprietary, within the meaning of this Act, because the word "Pritchards" forms part of it. For these reasons, I conclude that, in the case of the third label, it does contain a proprietary designation within the meaning of that phrase as used in the Act, and therefore as regards this third label, I answer question 2 of the originating summons in the affirmative.

I understand that it has been agreed that each side shall pay their own costs.

Solicitors: *Constant & Constant; Thompson, Quarrell & Co.*

H. L. L.

EVERSHED J.

1946

Oct. 24; Nov. 13.

In re UNITED LAW CLERKS SOCIETY.

Friendly societies—Investment—Range of investments—" Security "—Meaning—Friendly Societies Act, 1896 (59 *&* 60 *Vict., c.* 25), *s.* 44, *sub-s.* 1 (*e*)*—Friendly Societies Act,* 1908 (8 *Edw.* 7, *c.* 32), *s.* 4.

A Friendly Society passed an amendment of its rules sanctioning the insertion of an additional clause to the rule empowering the committee to pass resolutions " directing the investment in any of " the following securities " of moneys standing to their credit. The clause was as follows: " Debenture stock or guaranteed " stock or preference stock or preference shares of any company " incorporated under royal charter or by special Act of Parliament " or under any general Act of Parliament . . . ."

Held, that, having regard to the provisions of the Friendly Societies Acts, the Chief Registrar of Friendly Societies had acted rightly in refusing to register the amendment, in so far as it comprehended preference stock or shares in chartered or incorporated companies.

In re Smithers [1939] Ch. 1015 referred to.

MOTION.

At the annual general meeting of the United Law Clerks Society, held on May 16, 1945, an amendment of the rules was passed sanctioning the insertion of an additional clause to the rule empowering the committee to pass resolutions " directing " the investment in any of the following securities " of moneys standing to their credit. The clause was as follows: " Debenture stock or guaranteed stock or preference stock " or preference shares of any company incorporated under " royal charter or by special Act of Parliament or under any " general Act of Parliament which has in each of the five " years immediately prior to the date of the investment paid a " dividend of not less than four per cent. per annum upon its " ordinary stock or ordinary shares of which fact a certificate in " writing by a member of the London Stock Exchange shall be " sufficient evidence."

An application having been made to the Chief Registrar of Friendly Societies for the registration of the amendment, he refused it on the ground that the amendment purported to extend the range of investment of the society's funds beyond the limits imposed by the Friendly Societies Acts. The trustees made an application to the court, by motion, that the chief registrar might, notwithstanding his decision, be directed forthwith to register the amendment.

Pascoe Hayward K.C. and *Charles R. Russell* for the plaintiffs. Having regard to the words "any other" in s. 44, sub-s. 1 (*e*) of the Friendly Societies Act, 1896 (1), in its relation to the preceding paras. (*a*), (*b*), (*c*) and (*d*), the word "securities" is here synonymous with any form of investment. The authorities show that the word "security" has a narrow or restricted meaning, unless the context gives it an extended meaning: See *In re Rayner* (2) and *Singer* v. *Williams* (3). Investments are included under s. 4 of the Friendly Societies Act, 1908, unless anything can be found to the contrary.

The word "securities" is frequently used to cover something wider than the narrow meaning of money secured on property. [They referred to *In re Smithers* (4).] In s. 44 of the Act of 1896 the word "securities" is used in the wider sense, namely, stocks and shares or investments which pass by transfer under instruments of title. Section 44 sub-s. 1 (*e*) must be read in the light of the whole section and reliance is placed on the word "other" in support of the contention that the word "securities" must be read in its wider sense.

Danckwerts for the defendant, the Chief Registrar of Friendly Societies. There is no context to show that the use of the word "securities" in its wider sense is justified in the present case. see *Ogle* v. *Knipe* (5). The authorities are reviewed in *In re*

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(1) By the Friendly Societies Act, 1896, s. 44, sub-s. 1: "The "trustees of a registered society or "branch may, with the consent of "the committee or of a majority "of the members present and "entitled to vote in general meet-"ing, invest the funds of the "society or branch, or any part "thereof, to any amount in any of "the following ways: (*a*) in the "Post Office Savings Bank, or in "any savings bank certified under "the Trustee Savings Bank Act, "1863; or (*b*) in the public funds; "or (*c*) with the National Debt "Commissioners as in this Act "provided; or (*d*) in the purchase "of land, or in the erection or "alteration of offices or other "buildings thereon; or (*e*) upon "any other security expressly "directed by the rules of the "society or branch, not being "personal security, except as in "this Act authorized with respect "to loans."

By the Friendly Societies Act, 1908, s. 4: "In sub-s. 1 of s. 44 "of the principal Act . . . . the "following paragraph shall be "added after para. (*e*) :—' or "'(*f*) in any investment in which "'trustees are for the time being "'by law authorized to invest "'trust funds.'"

Section 14, sub-s. 3—"Every "enactment, and word which is "expressed to be substituted for "or added to any portion of the "principal Act shall form part of "that Act in the place assigned "to it by this Act . . . ."

(2) [1904] 1 Ch. 176.

(3) [1921] 1 A. C. 41.

(4) [1939] Ch. 1015.

(5) (1869) L. R. 8 Eq. 434.

Hutchinson (1). He also referred to Maxwell on the Interpretation of Statutes, 8th ed., p. 36.

Cur. adv. vult.

Nov. 13. EVERSHED J., delivering a written judgment, said: This is an appeal by or on behalf of the United Law Clerks Society, a friendly society registered under the Friendly Societies Acts, against a refusal (dated August 20, 1946) on the part of the Chief Registrar of Friendly Societies to register an amendment of the society's rules. In accordance with s. 9 of the Friendly Societies Act, 1896, r. 42 of the society's rules makes provision for the investment of the society's funds and specifies the class of investments in which such funds may be invested. Apart from the amendment which has given rise to the present appeal the investments authorized do not comprehend investment in the shares of joint stock companies. The proposed amendment (which has no doubt been occasioned by the difficulty under present monetary conditions of obtaining from "gilt-edged securities" other than a low rate of interest) would extend the permissible range of investment so as to include (among others) a limited class of preference stocks and preference shares in companies incorporated under royal charter or by special or general Act of Parliament. In so far as the amendment comprised this class of investment, the Chief Registrar was of opinion that it fell outside the authority conferred by s. 44 of the Act of 1896, and would accordingly be unlawful. He therefore refused registration. The present appeal is brought pursuant to ss. 12 and 13 of the Act of 1896. The sole point in the appeal is whether the word "security" occurring in the phrase "any "other security" in sub-s. 1 (*e*) of s. 44 of the Act of 1896 is meant to include any form of investment of money or must be confined to the stricter or more narrow significance of debts or money claims, the payment of which is "secured" or "guaranteed" by a charge on some property or by some document recording the obligation of some person or corporation to pay; and so as not to include the holding of shares in limited companies, which are of the nature of participations in an enterprise and do not involve the conception of a creditor-debtor relationship.

There is no doubt that at the present day the words "security" and "securities" are not uncommonly used as synonymous with "investment" or "investments," and it is tempting in a case such as the present so to stretch the meaning of the words. Several cases were cited in argument to illustrate this popular usage of which *In re Rayner* (1) is an example. It is unnecessary for me to refer in detail to the authorities, as it was conceded by the learned counsel for the appellants that the prima facie meaning of the words "security" or "securities" is the narrower of the two alternatives posed above and that the meaning will not be extended to the wider alternative in the absence of some context requiring such extension: see, for example, the opinion of Lord Cave in *Singer* v. *Williams* (2), followed recently by Crossman J. in *In re Smithers* (3).

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(1) (1919) 121 L. T. 239.

I may add that in cases relating to wills and particularly to "home-made" wills the courts will concede some degree of latitude in the interpretation of inelegant expressions, which are not to be expected in Acts of Parliament. I am bound, however, to say, as regards drafting elegance, that the language used in the section under review is hardly less delphic than that employed by many an inexpert testator. But, applying what I conceive to be proper principles of interpretation to the present case, I do not think that I can, as a jugde of first instance, do other than attribute to the word "security" as used in s. 44, sub-s. 1 (*e*) of the Act of 1896, the narrower or stricter interpretation.

[His Lordship read s. 4, sub-s. 1, and continued:] To this sub-section an amendment has been made by s. 4 of the Friendly Societies Act, 1908, providing that the following further words be added after (be it noted, "after" and not "before") para. (*e*), namely "or (*f*) in any investment in which "trustees are for the time being by law authorized to invest "trust funds." Section 14, sub-s. 3, of the Act of 1908 requires that the section of the principal Act shall, as from the commencement of the Act of 1908, be construed as if the added paragraph had originally formed part of the principal section.

The first and main argument for the appellants rested upon the two words "any other" immediately preceding the word "security" in para. (*e*) of the sub-section. According to the ordinary and proper use of language, these two words must, it was claimed, import a reference to the subject matter of all the four preceding paragraphs, that is, the phrase "any other "security" must mean any security other than the kinds of security mentioned in all the paras. (*a*) to (*d*) inclusive. On this view, and having particular regard to the terms of para. (*d*) "in the purchase of land, or in the erection or alteration of "offices or buildings thereon" (a form of investment which could not be brought within the narrower significance of the word "security"), it was urged that "security" must have been intended to be synonymous with any form of investment. On the other hand it was said that the proper interpretation of the phrase "any other security" was any security other than those securities previously mentioned; that it was not necessary for the word to be understood as comprehending all the matters in all the preceding four paragraphs; and that, in any event, the application of the funds of the society in the erection or alteration of offices or buildings was not an investment in any sense which the word "security" could legitimately bear.

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(1) [1904] 1 Ch. 176.

(2) [1921] 1 A. C. 41, 42.

(3) [1939] Ch. 1015.

Before stating my view on this, which constitutes the short but principal issue of construction in the case, I refer to the argument based on the amendment introduced by the Act of 1908. It was strongly urged by Mr. Danckwerts, on behalf of the Registrar General that, as the Act of 1908 was plainly an enabling Act, it was only sensible to suppose that the terms of the relevant amendment proceeded on the basis that trustee investments (save such as were covered by paras. (*a*), (*b*) and (*c*) of the original section) were outside the scope of the authority conferred by s. 44 of the Act of 1896. On the other side, attention was directed to the distinction between those classes of investments which were in any case allowable under the Act of 1896 (that is, those covered by paras. (*a*) to (*d*) inclusive), and those which might in addition be made allowable by virtue of a direction in the society's rules according to para. (*e*). It was said that the scheme of the Act (as shown by s. 9 and the first schedule) was that prima facie a society could provide for its own classes of authorized investments as it chose, and that since s. 44, sub-s. 1, was a limitation on that power, it should not be construed as having a greater limiting effect than was strictly necessary; and accordingly that the only effect and purpose of the amending Act was to enlarge the range of permitted investments which were in any case allowable in the absence of a direction in the rules.

I am bound to say that I find difficulty in accepting this argument of the appellants. If the purpose of the amending statute had been as the appellants contend, I should have expected the new para. (*f*) to have preceded and not followed para. (*e*)—in which case the whole argument of the appellants might have been on other grounds much simplified. But I also feel some difficulty in interpreting the words of a statute ex post facto, as it were, by reference to a later amending Act even when (as in the present case) the later Act requires that the original section should read as if the amendment had originally formed part of it. I prefer accordingly to assume for the purposes of the argument that the amending Act throws no light one way or the other on the meaning to be attributed to the word "security" in the original section. Even so, I come to a conclusion adverse to the appellants on their main submission. In deciding between the two alternatives offered, I must, as I have already stated, proceed on the view that prima facie the word "security" will not be interpreted as comprehending all forms of investment. I look therefore, to see in what senses the word has been used in other sections of the Act. In the first place, there is the phrase "not being personal "security" in the same paragraph of the sub-section in question—a phrase indicative of the narrower rather than the wider meaning of the word. Further, in the same fasciculus of sections in which s. 44 is found, the word "security" occurs in s. 45 (twice), s. 46 (twice) and s. 48 (once). The plural "securities" is used in s. 50 and the word "secured" in s. 53. In the next part of the Act the word "security" is again used, in s. 54. In each of these other places the word "security" (or a cognate word), is, in my judgment, plainly used in the narrower sense. So far as I have discovered, neither the word "security" nor any cognate term is elsewhere used in the Act.

According to well recognized canons of construction a word will prima facie be taken to be used in the same sense throughout a document. In my judgment I cannot say that there is a context in s. 44, sub-s. 1 (*e*) sufficient to give to the word "security" in that paragraph a meaning different from that in which it is elsewhere used. Put the other way, the sense in which I think the word and cognate words are elsewhere used in the Act compels me to attribute to it in the former place the narrower and stricter significance. It is well settled that in attempting to resolve an ambiguity of language in an Act of Parliament it is permissible to refer to previous Acts in pari materia. I have, therefore, with the assistance of counsel, referred to the history of the legislation affecting Friendly

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Societies. The first general Act regulating such societies was passed in the year 1793 and since that date there have been numerous amending and (from time to time) consolidating statutes. Before making any reference to the terms of any of these Acts one general observation may be made. It is, I think, clear from the general tenor of the legislation that special care has been taken by Parliament to protect from risks the funds of societies which form the source of the benefits to be provided to their members. In s. 1 of the amending Act of 1846 one of the purposes of a Friendly Society is stated to be the frugal investment of the savings of members.

I turn to the statutes themselves. It is, in my judgment, plain from the terms of the original Act of 1793 and the amending and consolidating Acts before 1855 that investment in the shares of joint stock or trading companies was outside the authority of the Acts and that the word " security " when used in those Acts (for example, in s. 12 of the consolidating Act of 1850) bore its narrower and stricter meaning. In 1855 a further consolidating Act was passed. Section 32 of that Act provided for the investment of a society's funds—" in any savings bank or in the public " funds or with the commissioners for the reduction of the " national debt as hereinafter mentioned or in such other " security as the rule of such society may direct, not being the " purchase of house or land (save and except the purchase of " buildings wherein to hold the meetings or transact the " business of such society, as hereinbefore mentioned) and not " being the purchase of shares in any joint stock company or " other company with or without charter of incorporation and " not being personal security except in the case of a member " . . . ." The language of this section, having regard particularly to the words " not being the purchase of shares " etc., plainly gives ground for the argument that the word "security" is there used in its widest sense. In the year 1875, however, the Act of 1855 was in turn repealed and replaced. In the Friendly Societies Act, 1875, a new formula was in s. 16, sub-s. 1, applied to the provisions in regard to investment, such new formula being in substance identical with that contained in s. 44, sub-s. 1, of the Act of 1896. It is to be noted that the Act of 1875 was passed following the report of the Royal Commission on Friendly Societies associated with the name of Sir Stafford Northcote and provided for the first time an additional safeguard to members in the form of compulsory periodical valuations of the society's assets.

If the argument of the appellants is well founded, it must follow that Parliament must be taken, by the adoption of a new form of words in regard to investment which new form did not contain the language in the Act of 1855 expressly excepting investment in shares of companies, to have intended in 1875 for the first time to authorize the trustees of Friendly Societies to invest their funds in any form of investment however speculative and hazardous. When regard is had to all the relevant circumstances including the general characteristic of the legislation to which I have referred, such a conclusion appears to me untenable. I therefore fail to find in an examination of the statutes before 1896 any basis for giving to the word " security " in s. 44, sub-s. 1, of the Act of 1896 the wider or more general meaning claimed.

One other matter may be mentioned. Mr. Danckwerts, in the course of his argument, drew my attention to the corresponding statutory provisions relative to Industrial and Provident Societies to be found in s. 38 of the Industrial and Provident Societies Act, 1893, by virtue of which Act such societies were, as I understand, for the first time regulated distinctly from Friendly Societies. It is, I think, clear that there is, at the least strong ground for supposing that the word " security " in the opening sentence of s. 38, sub-s. 1, of the Industrial and Provident Societies Act, 1893, was used in its widest sense and in any case, by para. (*c*) of that sub-section, shares in limited companies were included in the permitted range for investment of the funds of such societies. But it is in my judgment not legitimate to proceed from the use of the word " security " in s. 38 of the Industrial and Provident Societies Act, 1893, to the conclusion that the word was used in the same sense in s. 44 of the Friendly Societies Act, 1896. Parliament may well have considered a much wider range of investment than that permitted to Friendly Societies was requisite to societies the principal purpose of which was defined to be " for carrying on " any industry, trade or business."

In conclusion, I draw attention to the fact that, according to the Shorter Oxford English Dictionary, published in 1933, the most extended meaning of the word " security " is given as follows : " a document held by a creditor as guarantee of his " right to payment : hence any form of investment guaranteed " by such documents," to which meaning the date 1879 is assigned.

For the reasons that I have stated I come to the conclusion

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that the Chief Registrar was right to refuse registration of the amendment of the rules of the United Law Clerks Society in so far as such amendment comprehended preference stock or shares in chartered or incorporated companies. The motion must be refused accordingly.

Solicitors: *Church, Adams, Tatham & Co.*: *Treasury Solicitor.*

J. L. D.

VAISEY J.

1946

Oct. 21; *Nov.* 22.

In re 36, 38, 40 AND 42 JAMAICA STREET, STEPNEY.

War damage—Reinstatement—Payment of cost of works—Amount payable by War Damage Commission—"Direct result of action taken "by the enemy"—War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *s.* 1; *s.* 2, *sub-s.* 1 (*a*); *s.* 3, *sub-ss.* 1, 2; *s.* 4, *sub-ss.* 1, 2; *s.* 5, *sub-ss.* 1, 2; *s.* 6, *sub-s.* 1; *s.* 7, *sub-s.* 1; *s.* 8, *sub-ss.* 2, 4; *s.* 9, *sub-s.* 1; *s.* 10, *sub-s.* 1; *s.* 31, *sub-s.* 1 (*b*); *s.* 32, *sub-ss.* 1, 3; *s.* 123; *s.* 127, *sub-s.* 1; *Third Schedule, para.* 3 (1.).

The explosion of a bomb structurally damaged four old houses. The blast so seriously affected the stability of their front walls, which were already in a bad condition, and so accentuated their defects, that the front walls had to be rebuilt. The War Damage Commission determined that, as the walls were defective before the bombing, the proportion to be borne by the Commission of the proper cost of the works executed for making good the damage was, in each case, 40 per cent., which the Commission later reduced to 33⅓ per cent.

On appeal by the owners of the houses, who contended that the Commission ought to bear the whole of the proper cost:—

Held (1.) that it could not be known whether the same or a less amount of work would have had to be done if the walls had been, just before the bomb exploded, free from structural defect; (2.) that the damage necessitating the work of reinstatement was "the direct result of action taken by the enemy" within the meaning of those words in s. 2, sub-s. 1 (*a*) of the War Damage Act, 1943; the explosion was the proximate or immediate cause of the damage, and not merely a contributory cause acting in conjunction with the structural defects as another contributory cause; and, even if the structural defects were a causa sine qua non, the enemy action was none the less the sole causa proxima, which was only another way of saying that the damage occurred as the "direct result" of it; *Mardorf* v. *Accident Insurance Co.* [1903] 1 K. B. 584 and *In re Etherington and the Lancashire and Yorkshire Accident Insurance Co.'s Arbitration* [1909] 1 K. B. 591 considered; (3.) that the payment to be made by the Commission was the whole of the cost of the works.

ORIGINATING MOTION.

This was an appeal by way of originating motion by the owners of four houses against a determination of the War Damage Commission that, notwithstanding that a payment of cost of works was appropriate in respect of the works executed for making good war damage to the houses by the reinstatement of them in the form in which they existed immediately before the occurrence of the damage, only one third of the proper cost was payable to the owners by the Commission.

The facts are fully stated in his Lordship's written judgment.

E. E. S. Montagu, K.C. and *Michael Hoare* for the appellants. This is the first appeal under Part I of the War Damage Act, 1943, and it raises questions of construction under that Act. It is an appeal on a case stated by the War Damage Commission. The question raised was whether work required to rebuild the wall of a house, which was admittedly an old wall but was standing satisfactorily when the bomb which blasted it was dropped, was work of which the whole could be said to have been made necessary by war damage. After the bombing, the owners' agents interviewed a number of war damage officials. Payments were agreed, but the Commission's advisers procured a reduction of the figures, on the ground that the Commission does not pay for betterment. In 1944 the Commission decided that the front walls of two of these four houses had to be wholly rebuilt and those of the other two three-quarters rebuilt. The estimate was that the cost would be 120*l.* for each front wall. The Commission's technical advisers decided that the walls were old and inherently bad, and therefore that the Commission, in respect of these particular walls, was responsible for only 40 per cent. of the cost, which figure they later reduced to 33⅓ per cent. That was done because the Commission, since their advisers ultimately took the view in this case and with regard to other properties, that the Commission's share ought to be less, adopted the convenient method of undertaking to pay one-third of the total quantum. The owners contend, however, that the Commission is not entitled to make any reduction at all, but must pay the whole of the proper cost of the works executed for mading good the damage. [They referred to ss. 1, 2, 6, 7, 8, 31 and 32 of the War Damage Act, 1943, and to Or. 55c of the Rules of the Supreme Court.] The basis of the Act is the ensuring that houses go up at a rate to keep pace with the loss being borne by the population as a whole. Therefore there is a whole scheme of reinstatement, which is set out in s. 10 of the Act. The present case falls exactly within s. 8, which prescribes how cost of works payments are to be computed. The fact that the walls were badly constructed or were defective before the damage occurred is irrelevant. They had to be rebuilt because of bomb damage, and the Commission had to rebuild them in their old form.

Michael Rowe K.C. and *Danckwerts* for the Commission. The essential point in the case turns on s. 8 of the Act. The " cost " is the cost of war damage, not of anything else, and war damage is caused by enemy action. The only question to be decided is what repairs were necessary to make good the damage. In the present case, and all others like it, that question becomes one of pure fact. The Act deals with a difficult problem, and it may well be that the facts of no two cases can be identical. The Commission must, therefore, have an immense amount of discretionary authority. In the present case they have found as a fact that the whole of the works were not necessary to made good the war damage. If it were proved that there were defects in the property and that repairs were necessitated partly by defects and partly by war damage the court must decide whether the Commission is bound to pay the full cost of the works. That is the question which the court has to decide in this case, and its decision ought to be that the Commission is not bound to pay the whole of the proper cost but is to pay only 33⅓ per cent. of it.

E. E. S. Montagu K.C. in reply. Under the Act, the Commission's finding that the walls have been structurally damaged and their condition made worse so that they have had to be rebuilt is a finding that there has been war damage. The legislature has decided that, if property has been damaged as a direct result of bombing, the Commission ought not to look for indirect causes which may have contributed. They ought not, for example, to look to see whether a wall was badly constructed previously. If the damage is " the direct " result " of bombing, the owner is entitled to be paid the proper cost of reconstructing the property in the form in which it was before the enemy action. What is " war damage " is a question of law for the court, and, if the Commission was wrong in its finding, it is for the court to say so.

Cur. adv. vult.

Nov. 22. VAISEY J. read the following judgment. The appellants in this motion by way of appeal own, with a large number of neighbouring properties, four houses in the Metropolitan Borough of Stepney known as Nos. 36, 38, 40 and 42 Jamaica Street. The respondents to the appeal are the War Damage Commission (hereinafter called "the "Commission"), an organization originally constituted by the War Damage Act, 1941, but now to be deemed to have been set up under the consolidating Act at present in force, namely, the War Damage Act, 1943 (hereinafter called "the Act"). Section 127, sub-s. 3, of that Act provides that it is to have effect and to be deemed to have had effect as if it had come into operation at the time of the passing of the War Damage Act, 1941, which it repealed with certain exceptions not material to be here stated.

This is an appeal from a determination of the Commission with respect to the four houses which I have mentioned. The facts of the case are simple, and were agreed between the representatives of the appellants and the Commission as I will now state them. The houses on a day unknown to me were structurally damaged by the explosion of a bomb which fell on the opposite side of the street. Such explosion (in addition to the injury it caused to other property) seriously affected the stability of the front walls of the appellants' four houses, which were old houses. The front walls (with which alone this case is concerned) were in a bad condition, due mainly, it is said, to the inherent nature of the brickwork. However, adopting the phraseology of the parties' representatives, those defects were so "accentuated" by blast effect that the front walls had to be rebuilt as particularized in a schedule to the document (dated May 27, 1943), from which I am quoting. The sentence which follows discloses what I understand to be the "determination" of the Commission from which this appeal is brought; it reads thus: "As the walls were defective "prior to the bombing, the proportion of the proper cost to be "borne by the Commission has been agreed by me"—that is, the Commission's representative—"as detailed in the "schedule," and I pause here to observe that the word "agreed" was not and is not indicative of any such contract or arrangement between the parties as would preclude the appellants from maintaining this present appeal. The schedule to the document states that the approximate amount of rebuilding was, as regards Nos. 36 and 38, three-quarters of the fronts, and, as regards Nos. 40 and 42, the whole of the fronts, the percentage of proper cost to be borne by the Commission being in each case 40 per cent. This appears to have been subsequently reduced to 33⅓ per cent. The exact figure does not matter, for it is the appellants' contention that the Commission ought to bear the whole, that is, 100 per cent., and not any smaller percentage of the cost. The question which I have to decide is whether that contention is well founded. I will say at once that the principle of such an apportionment of the cost of rebuilding these walls, based upon and having regard to their condition prior to the occurrence of the war damage, strikes me as being in itself fair and reasonable, but the solution of the question must, in my judgment, depend upon the actual expressions of the Act, which fall to be examined with some particularity.

The effect of s. 1 of the Act is sufficiently summarized in the side-note, which says: "Provision to be made with "respect to war damage to land and to goods." Section 2 defines "war damage" under various heads, but I need only mention head (*a*), which says that war damage means "damage "occurring (whether accidentally or not) as the direct result "of action taken by the enemy . . . ." I may assume that the bomb which exploded was in fact a bomb dropped from an enemy aircraft. The expression "direct result" is, in my judgment, very important, and on its true meaning the decision in the present case may largely depend; I will refer to it again presently. The Commission is constituted by s. 3, or, by virtue of s. 127, sub-s. 3, already mentioned, must be deemed so to be. By s. 4 proceedings under the Act are to be assigned by the Lord Chancellor to nominated judges. Section 5 provides for the Commission dealing with hereditaments as separate units, and defines a "developed "hereditament" as one which comprises a building or a part of a building and the site thereof, and this we have in the present case. Section 6 provides that payments in respect of damage to hereditaments shall be either "(*a*) a payment of "cost of works, being a payment of an amount determined "by reference to the cost of works executed for making good "the damage, as provided by s. 8 of the Act; or (*b*) a value "payment, being a payment of an amount determined by "reference to the depreciation in the value of the hereditament "caused by the damage, as provided by s. 10 of the Act." Admittedly, the present case falls under head (*a*) as one for a cost of works payment, because s. 7 provides that in the case of a developed hereditament the payment shall be a payment of cost of works unless the war damage involves total loss, which of course it did not do here.

I now come to s. 8, which lays down the method of computing a cost of works payment, and I must first read sub-s. 2: " If the war damage is made good by reinstating " the hereditament in the form in which it existed immediately " before the occurrence of the damage, the amount of the " payment shall be an amount equal to the proper cost of " the works executed for the making good thereof." Let it be noted that the damage has to be " made good," and the hereditament " reinstated," and that pre-existing form only, and not pre-existing state or condition, is mentioned. I now pass to sub-s. 4, which, so far as it is material, is as follows: " The preceding provisions of this section shall have effect " subject to the provisions of the third schedule to this Act as to " deductions in respect of the value of materials, of failure " to take steps to minimize war damage, of physical changes " not directly attributable to war damage occurring between " the occurrence and the making good of war damage . . . ." Here it must be observed that physical changes occurring before the war damage are not mentioned.

Section 9 provides who is to receive the cost of works payments. Section 10 should be read by way of contrast to s. 8, for it lays down that, " a value payment shall be an " amount equal to the amount of the depreciation in the value " of the hereditament caused by the war damage, that is to " say, the amount by which the value of the hereditament in " the state in which it was immediately after the occurrence " of the damage is less than its value in the state in which " it was immediately before the occurrence of the damage," and it is to be observed that the " state " of the hereditament before and after the occurrence of the war damage is here a determining factor in the ascertainment of the amount.

Section 32 is to the effect that any question arising in carrying out the provisions of ss. 6 to 8, or s. 10, and certain other sections and provisions of the Act, shall be determined by the Commission with a right (under sub-s. 3) for any person aggrieved by any such determination—with exceptions which I need not state—to appeal therefrom on any question of law to the High Court. The making of Rules of Court is authorized by the same section, and this has been done by

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Rules of the Supreme Court, Order 55C which in its revised form bears date April 25, 1946, and is printed in the Weekly Notes of May 11, 1946 (1). I may mention that I heard this case as a nominated judge within the meaning of s. 4 of the Act, and of Or. 55C.

In s. 123 there are a few definitions which may be relevant, especially of the expressions "making good" and "proper "cost," but I need not go into the details of these. The third schedule to the Act is, I think, only material for the present purpose in what is stated in para. 3 (1.), which reads thus: "The amount of a payment of cost of works shall be "reduced by any amount by which the proper cost of the "works executed for making good the war damage is increased "by reason of any physical change in the hereditament not "directly attributable to war damage (other than ordinary "wear and tear) occurring between the time of the occurrence "of the damage and the time when it is made good." As already noted, there is no reference to precedent physical changes.

I have now referred to all the provisions of the Act which seem to me to bear upon the matter which I have to decide. The documents in the case consist of: (i.) the appellants' notice of motion, which is dated March 28, 1946; (ii.) the Commission's Statement of the Case filed May 24, 1946, and (iii.) certain notes of interviews, supplied by the Treasury Solicitor, forming an annexe or addendum to the Statement of the Case. From these documents, from the Act itself, and not least from the able arguments of counsel, I have to form my conclusions on a point which is not, in my judgment, an easy one.

I was invited by counsel for the Commission to dismiss the present appeal on the ground that it involved no question of law, and that the determination sought to be appealed from was a finding of fact from which no appeal lies. In my judgment, no such easy way of disposing of the case is open to me. I think that it does turn upon a question of law, and one that arises out of the terms of the Act itself.

This is, I believe, the first case of its kind, and there is no previous judicial pronouncement to guide me. No authority of any kind was cited to me by counsel, nor have I since the hearing been able to discover any really useful decision or dictum in any reported case dealing with an analogous subject-matter. Some little light is, however, thrown upon the expression "direct result" by two insurance cases, to which I will briefly refer. The first of these is *Mardorf* v. *Accident Insurance Co.* (1). There, a person was insured under a policy whereby the defendants agreed to pay him a certain sum in case he should be injured by accidental violence, and should die within three months of its occurrence if the injury should be the "direct and sole cause" of his death. There was, however, a condition that the policy was not to apply to "death caused by or arising wholly or in part from disease "or other intervening cause, even although the disease or "other intervening cause may either directly or otherwise be "brought on or result from accident." "Disease" was defined as meaning certain specified illnesses not including erysipelas, septicæmia, or septic pneumonia. The facts were that the assured accidentally scratched his leg, which ten days later became inflamed, and erysipelas set in, followed in three days by septicæmia, and soon afterwards by septic pneumonia, of which in less than a week the man died. The defendants admitted that the septic germs, the development of which caused the man's death, were introduced into his body at the time of the infliction of the wound. It was held that the erysipelas, septicæmia, and septic pneumonia were not "intervening causes" within the meaning of the policy, but merely stages in the development of the septic condition which was immediately brought about by the introduction of the poison, and that the man's death was caused, directly and solely, by the accidental injury to his leg.

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(1) [1946] W. N. Pt. II., at p. 33.

The other case is *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.'s Arbitration* (2). It will suffice if I read the headnote to the report: "By the terms of "a policy an accident insurance company undertook, if, at "any time during the continuance of the said policy, the "insured should sustain any bodily injury caused by violent, "accidental, external, and visible means, then, in case such "injury should, within three calendar months from the "occurrence of the accident causing such injury, directly "cause the death of the insured, to pay to the legal personal "representatives of the insured the capital sum of 1,000*l.* "The policy contained the following proviso: 'Provided "'always and it is hereby as the essence of the contract "'agreed as follows: that this policy only insures against

(1) [1903] 1 K. B. 584. (2) [1909] 1 K. B. 591.

" ' death where accident within the meaning of the policy is " ' the direct or proximate cause thereof, but not where the " ' direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening " ' cause may itself have been aggravated by such accident, or " ' have been due to weakness or exhaustion consequent " ' thereon, or the death accelerated thereby.' The assured " while hunting, had a heavy fall, and, the ground being very " wet, he was wetted to the skin. The effect of the shock " and the wetting was to lower the vitality of his system, and " being obliged to ride home afterwards, while wet, still further " lowered his vitality. The effect of this lowering of his " vitality was to cause the subsequent development of " pneumonia in his lungs, of which he died. The pneumonia " was not septic or traumatic, but arose as a direct and " natural consequence from the fact that the diminution of " vitality caused through the accident, as above mentioned " allowed the germs called ' pneumococci ' which in small " numbers are generally present in the respiratory passages, " to multiply greatly and attack the lungs :—*Held*, affirming " the judgment of Channell J. that the death of the assured " was directly caused by accident within the meaning of the " policy, and that the case did not come within the proviso " therein, and the company were consequently liable on the " policy." I am well aware that analogies do not always conduce to clear thinking, but let me take as comparable to the present the case of a man whose foot is so severely injured by a bomb (i.e. enemy action) that it has to be amputated ; it seems to me that the injury, and the necessity for reinstating his leg by the provision of an artificial foot, would be the direct result of such enemy action, and that the fact that the man's foot had been gouty or rheumatic is immaterial. It is noticeable that the word " defective," which occurred so frequently in the course of this case, is nowhere to be found in the Act—neither, I believe, are the words " age," " instability " or " weakness," at any rate not in any of the relevant sections.

The contentions of the parties respectively have been formulated in various ways, some of which are plainly, in my judgment, untenable. Thus, in a letter dated October 9, 1945, the Commission wrote as follows : " The Commission's con- " tention is that the rebuilding of the front walls of these " properties is more than is necessary to reinstate the war "damage, particularly in view of the fact that the condition "of the walls is not wholly the result of enemy action." To that way of putting it, I would point out that, according to s. 8 of the Act, the war damage has not to be reinstated but has to be made good by the reinstatement of the hereditament in its previous form though not necessarily in its previous state. In the same letter the Commission disclaim, I think rightly, the contention that the appellants should contribute to the cost because they will have obtained "betterment" and it is now admitted that the substitution of new work for old is inevitable in practically every case, and does not in itself give rise to a case for apportionment of cost of works.

At the end of the hearing before me, Mr. Rowe put the Commission's case in a form which was to my mind attractive, and expressing it in my own language, as I understood it, I think it came to this: If the unsoundness of the building was of such a character that the war damage was greater than it would have been if the building had previously been perfectly sound, then the Commission should not be called on to pay more towards the cost of reinstatement than they would have had to pay to reinstate the hypothetically sound building. My difficulty in accepting that is twofold: first, I cannot find that the Commission have ever applied any such formula to the present case, and, secondly, that it would be impossible to apply it to any case without some sort of inquiry which could rarely, if ever, be satisfactorily answered, for it is well-known that a well-built rigid structure may suffer greater damage from "blast" than an old building possessing qualities of suppleness, resilience and flexibility.

In the present case, three-quarters of two of the walls and the whole of the other two, have had to be pulled down and rebuilt, and for myself I cannot see how it could ever be known whether the same or a less amount of work would have had to be done if the four walls had, just previously to the time when the bomb exploded, been free from all structural defects. There is no finding to the effect that the walls would have fallen down within any measurable distance of time if no enemy action had injured them. I think also that the damage done to them necessitating the works of reinstatement was the "direct result" of the explosion; that the explosion was (in other words) the proximate or immediate cause of the damage, and not merely a contributory cause acting in conjunction with the structural defects as another

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contributory cause; and that even if (which is by no means shown to be the case) those defects constituted a causa sine qua non, the enemy action was none the less the sole causa proxima, which is to my mind only another way of saying that the damage occurred as its direct result.

The contentions of the parties, however variously expressed, all seem to me to come to much the same thing. For instance, it was said, on behalf of the Commission, that they "could "not accept the contention that they were bound to pay the "full cost of rebuilding a structure which was in fact defective "before it sustained war damage. It was a question of fact "in each case to be decided by the judgment and good sense "of the surveyors on both sides to decide how far the property "was defective before the occurrence of the war damage and "to reach a fair settlement"—see para. 3 (*m*) of their Statement of the Case and observe the repetition of the word "defective" here. As against this, the appellants say "the "fact is that all this work was necessitated by bomb damage." How fine the line dividing the rival contentions is, appears very clearly from the concluding sentence of the Statement of the Case, in which the Commission state that they "have "never denied that, if the whole of the works had been "necessary to make good war damage, the amount of the "payment of cost of works which can be claimed by the "appellants would not be liable to be reduced either by "reason of the condition or age or instability or weakness of "the said front walls or because the works had improved "the hereditaments or because structural defects existing in "the said walls immediately before the occurrence of the war "damage had incidentally been remedied by the execution of "the works."

I confess that I find it very difficult to reconcile the expressions of the sentence just quoted with the "determination" of the Commission from which this appeal is brought, and with the words of the quotation taken from para. 3 (*m*). My own understanding of the Act is that if there is war damage, and if works are thereby made necessary in order to reinstate the building in its pre-existing form, the whole cost of such works must be borne by the Commission, and I can see no exception to or qualification of this proposition short of a case in which the building would, at the time of the war damage, have had to be reinstated (not repaired) in any case, as for instance where a chimney stack

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had just previously to the occurrence of the war damage, been blown down (not merely weakened) by a gale.

For the reasons which I have endeavoured to explain I have come to the conclusion that the view taken by the appellants in regard to the four houses is to be preferred to the view put forward on behalf of the Commission, and I propose to declare that the payment to be made is the whole, and not 40 per cent. or 33⅓ per cent. of the cost of works in respect of the rebuilding of the two three-quarter fronts or the two whole fronts of those houses. I am not disposed to make a declaratory order in any general terms, but the decision of this case will presumably affect many other cases. If any leave to appeal is required, I very willingly give it, for I may (without, I hope, impropriety) say that the matter is, in my judgment, one well meriting review by higher courts, and possibly (if my decision is right) calling for some amending legislation, retrospective or otherwise. I must order the Commission to pay the costs of the present appeal.

Solicitors: *M. T. Turner & Co.; Treasury Solicitor.*

K. R. A. H.

In re SOUND CITY (FILMS), LIMITED.

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Oct. 28.

Company—Resolution varying rights of preference shareholders—Application to cancel variation—Time limit for application—Authority of holders of fifteen per cent. of shares affected—To be given in writing to petitioner before petition filed—Companies Act, 1929 (19 *&* 20 *Geo.* 5 *c.* 23), *s.* 61.

On a petition under s. 61 of the Companies Act, 1929, asking the court to cancel a variation in the rights of any class of shareholders, which the requisite majority has consented to or resolved upon at a general meeting of that class, the shareholders supporting the application, who must hold at least fifteen per cent. of the issued shares of that class, must give their authority in writing, and communicate that authority to the petitioner before the date of presentation of the petition, i.e., within seven days from the date of the consent or resolution, and not merely before it comes on for hearing.

In re Suburban & Provincial Stores [1943] Ch. 156 followed.

MOTION.

Sound City (Films), Ld. was registered as a company in 1933

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with a capital of 350,000*l.* divided into 175,000 six per cent. cumulative preference shares of 1*l.* each and 700,000 ordinary shares of 5*s.* each, out of which 134,800 preference and 624,852 ordinary shares had been issued, and fully paid up. At a class meeting of the preference shareholders held on September 2, 1946, a resolution was passed by a majority of three-fourths, as required by the articles, to reduce the capital of the company, and to cancel all arrears and accruals of cumulative preferential dividend on the issued preference shares up to May 31, 1946. No preferential dividends had been paid since 1937 and the arrears amounted to 40,035*l.* The company having now issued a balance sheet showing a profit of 45,036*l.* resolved, instead of using it to pay off arrears of dividend, to capitalize such arrears in the form of four per cent. cumulative funding stock to be issued to the preference shareholders carrying the right to the payment of a dividend of four per cent. in priority to the dividend on the preference shares, such stock to be paid off at the rate of 10 per cent. per annum for ten years. On September 9, 1946, Ferdinand Lewisohn, a registered holder of 250 preference shares in the company presented a petition under s. 61 of the Companies Act, 1929, praying the court to cancel and disallow the resolution on the ground that it was unfair to preference shareholders. The petition stated that it was supported by the preference shareholders whose names and addresses were given in the schedule and whose holdings were not less in the aggregate than fifteen per cent. of the issued preference shares, and that such shareholders had by writing appointed the petitioner to make the application on their behalf. The schedule contained a list of the names of 138 shareholders, holding in the aggregate 21,343 preference shares. The petition further alleged that the majority of the shareholders who voted in favour of the resolution were directors of another company which had a controlling interest in Sound City (Films), Ld. and held a large block of ordinary shares.

Before the hearing of the petition, it was ascertained that the figures in the schedule were erroneous in that some shareholders did not hold as many shares as was therein stated, and also that several of the shareholders mentioned had given proxies which were used to vote in favour of the resolution. The petitioner took out a summons for leave to amend the petition by including a fresh list of shareholders whose holdings would in the aggregate amount to more than fifteen per cent. of the preference share capital.

The company now moved to strike out the petition on the ground that it did not comply with s. 61 of the Companies Act, 1929, as the authority of the supporting shareholders was not communicated in writing to the petitioner before the filing of the petition.

Pascoe Hayward K.C. and *J. B. Richardson* for the motion. The petition does not comply with the conditions imposed by s. 61 (1). It cannot possibly succeed and therefore ought to be dismissed. The petitioner claimed to have the support of shareholders holding fifteen per cent. of the preference capital, but on investigation it was shown that many of the persons whose names appeared in the schedule to the petition gave proxies to vote for the resolution. It was not therefore supported by fifteen per cent. of the shareholders. The petition cannot be amended after the seven days have expired. *In re Suburban & Provincial Stores, Ld.* (2).

Gravenor Hewins for the petitioner. To contend that the appointment must be communicated to the petitioner before the time of the presentation of the petition is to put a gloss on the section which is not justified on its true construction. The section is a beneficial provision and the court should not be astute so to construe it as to make it more difficult of operation. The true view is that the section is complied with if the appointment is written and signed before the time of the presentation of the petition whether or not it is communicated to the petitioner before that time. The actual time of filing is the material time and as the filing of the petition is not a judicial act the court can and will inquire as to the hour of the day at which the petition was filed and the hour of the day at which the appointment was signed: *Clarke* v. *Bradlaugh* (1). The petitioner is not the agent of the shareholder who makes the appointment. A petition under the section is in the nature of a representative proceeding subject to statutory conditions and in a representative action the persons whom the plaintiff on the record professes to represent must be treated as if they themselves were in fact co-plaintiffs; *Watson* v. *Cave* (*No.* 1) (2). Even if he is an agent his appointment as agent need not be communicated to the petitioner: *Pole* v. *Leask* (3).

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(1) Companies Act 1929, s. 61:

(1.) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorizing the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class, or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than fifteen per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation may apply to the court to have the variation cancelled, and, where any such application is made, the variation shall not have effect unless and until it is confirmed by the court.

(2.) An application under this section must be made within seven days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(2) [1943] Ch. 156.

In re Suburban & Provincial Stores, Ld. (4) is plainly distinguishable.

EVERSHED J. On September 9, 1946, Mr. Ferdinand Lewisohn presented to this court a petition served upon Sound City (Films), Ld., praying that a certain variation of the rights of the preference shareholders of that company should be cancelled. The petition was presented pursuant to s. 61 of the Companies Act, 1929, and in order therefore that the petition should on the face of it be seen to comply with the requirements of that section, Mr. Lewisohn alleged in his affidavit that he had been appointed in writing by a number of persons, whose names were set forth in a schedule to the petition, to present the petition on their behalf as well as on his own. The schedule consisted of a list of the names of some 138 persons, and stated the number of preference shares that those persons were alleged to hold. The total of the schedule amounted to 21,343. The total number of preference shares issued was 134,800, so that assuming the schedule to be in all respects unimpeachable, the 21,343 represented more than fifteen per cent. of the total number of issued preference shares. There were, however, certain errors in that schedule in so far as certain persons were put down as holding more shares than they in fact held and others, unknown to Mr. Lewisohn, had given proxies which were used at the meeting in favour of the resolutions now sought to be impeached. The result was to reduce the effective number of shares for this purpose to a figure of

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(1) (1881) 8 Q. B. D. 63.
(2) (1881) 17 Ch. D. 19, 21.
(3) (1862) 33 L. J. (Ch.) 155.
(4) [1943] Ch. 156.

17,870 which was appreciably less than the number he required to show a title to sue.

The petitioner in reply included a new list of supporters, contained in an affidavit, filed by him on October 25, 1946, and brought the total number of those who follow him according to his petition, to 166 persons. After making certain corrections the total now of the shares which he claims to have marshalled on his side is some 21,000 odd, a number sufficient, if in other respects not open to challenge, to support the present petition. I am bound to say that I feel considerable sympathy with Mr. Lewisohn. The fact that he has so far marshalled no less than 166 persons to support his present application indicates the difficulties that stand in the way of an applicant under this section, when one is dealing with a company having a large issued share capital. The point is one, I am aware, which was presented to the Court of Appeal in *In re Suburban & Provincial Stores, Ld.* (1), and Lord Greene M.R., found that it was not a point of sufficient moment to make him doubt the correctness in that case of the decision of Bennett J. But I repeat that I cannot help feeling some sympathy for a man who, by the terms of the section, on the argument of Mr. Hayward, has but seven days in which to collect the necessary forces to support his application. If, however, in such a case as the present, the terms of the section place a heavy burden upon an applicant, that is a matter for Parliament and not for me.

The question involved is one which falls within a very small compass. On the facts of the case, as admitted or proved, it is quite plain that the individuals whose names are set out in the affidavit of October 25, in no way had communicated any authority to the petitioner at the time that he presented his petition. I assume for the purposes of the present application, that each one of those persons had in fact signed a document purporting to confer authority upon the petitioner before he presented the petition; but as I have said, it is conceded that the fact of their having so signed was unknown to him at the date when he presented the petition, and the sole question I have to determine is whether, in those circumstances, it can be successfully contended on Mr. Lewisohn's behalf, that he has satisfied sub-s. 2 of s. 61 of the Act. The second sub-section is in the following terms: "An application under this "section"—that is, to have the variation of rights cancelled—"must be made within seven days after the date on which the

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(1) [1943] Ch. 156.

"consent was given or"—as in the present case—"the "resolution was passed, as the case may be, and may be made "on behalf of the shareholders entitled to make the application "by such one or more of their number as they may appoint in "writing for the purpose." The phrase "the shareholders "entitled to make the application" means, according to the preceding sub-section, the holders of not less in the aggregate than fifteen per cent. of the shares of the class concerned, being persons who did not consent to or vote in favour of the resolution sought to be challenged.

The question, therefore, is, on the facts I have indicated—Can it be said that Mr. Lewisohn had been appointed in writing for the purpose of making the application by all the various persons indicated, before the expiration of seven days since the passing of the resolution? The matter comes before the court on a motion by the company to strike out the petition on the ground that it cannot, in any circumstances, succeed, by reason of the fact that the petitioner has not satisfied the requirements of sub-s. 2 of the section. There is before the court at the same time a summons for leave to amend the petition by adding the individuals whose names appear in the affidavit to the schedule in the petition. Mr. Hewins, on behalf of Mr. Lewisohn, has first drawn my attention to the circumstance that on an application to strike out a petition such as the present, the court must be satisfied beyond any reasonable doubt that the petition cannot succeed. That aspect of such an application was recently considered by Wynn-Parry J. in *Netz* v. *Ede* (1), to which Mr. Hewins referred, and it is, of course, well established that the court ought not to make use of its jurisdiction to stay proceedings at this stage in a case in which there is some point which ought to be and can be argued. But, as it seems to me, when the sole question is one of construction of a few words in the sub-section, it would be wrong, having reached my conclusion upon it, for me to say that because it involves or may be thought to involve some difficult point, I must postpone the decision till a later date; and in saying that, I am much influenced by the bearing upon this element of the case of the decision in *In re Suburban & Provincial Stores, Ld.* (2), to which I have already referred. That case was, of course, different in certain respects, and indeed in certain very important respects from the present, for in *In re Suburban & Provincial Stores, Ld.* (2), as appears from the facts stated,

(1) [1946] Ch. 224.

(2) [1943] Ch. 156.

the petitioner had not at the time he presented the petition, purported to obtain the authority in writing of holders of fifteen per cent. of the issued ordinary stock. His claim was that he had presented the petition on his own behalf and on behalf of other shareholders of not less than fifteen per cent., and that it would be sufficient if by the time the petition came to be heard he could get their authority ratifying the assumed agency. In this case, Mr. Lewisohn's contention is not that he has failed to get up to now any support but that, so far as is material to the present application, the appointment in writing had been made in fact although not communicated to him. But when I look at the reasoning of the decision both of Bennett J. and of the Court of Appeal, it seems to me reasonably plain that both courts proceeded on the view that since the question at issue is title to sue, a petitioner claiming to petition on behalf of others under this section must show that at the date he presents the petition on their behalf he was clothed with their authority to do so.

If that is the right view, it seems to me that the facts of this case admit of only one answer. Mr. Hewins has claimed that because these persons had put their names to written authorities that did clothe him with the authority to present the petition, although they had not communicated the fact to him, from which it follows, according to Mr. Hewins, that he would still be entitled to sue, although they never communicated the authority or even destroyed it without having done so. That seems to me to be an absurd construction, and my own view of this section is that in order to clothe the petitioner with the necessary authority, not only must that authority be in writing, as required by the language of the section, but the fact of it having been given must have been communicated to the person making the application. As I have said, that view, as it seems to me, plainly flows from the language and the reasoning in the decisions of Bennett J. and the Court of Appeal. Bennett J. used this language (1): " If the applicant himself did not hold " the prescribed percentage of shares, he must, at the date of " the presentation of the petition, have the written authority " of other qualified shareholders whose holdings together with " his own must amount in the aggregate to fifteen per cent. of " the issued shares of the class the rights of which were to be " varied." I take that language to mean that he must be able to show as a matter of fact that he, as an individual, has been authorized in writing by some other person, and I cannot see that that can be shown if the fact of an instrument having been executed has never been communicated to the petitioner.

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(1) [1943] W. N. 47.

In the Court of Appeal in the statement of facts it states (1): " When the motion came before Bennett J. on February 9, " the petitioner had received the support of well over fifteen " per cent. of the ordinary stock holders to the petition. " Bennett J. struck the petition out, on the ground that, the " petitioner having no locus standi at the time of the presentation, it was not proper to leave on the file a petition which " could not possibly succeed " ; and the argument of Mr. Valentine Holmes for the petitioner was that it would be sufficient if ex post facto the assumed agency was in writing and was ratified afterwards. The answer of Lord Greene to that argument makes no reservation of any kind to cover any case in which unknown to the petitioner some writing did exist. The learned Master of the Rolls took the view that the terms of the section did not contemplate ex post facto ratification: " If more shareholders than one make up the necessary fifteen " per cent. they can either all join in the presentation of a " petition or appoint one or more of their number in writing to " make the application on their behalf." Then he goes on to say that the question is one of title to sue, and says : " if he "— that is, the petitioner—" is not the holder of fifteen per cent. " the only way in which he can obtain a title to sue is by having " the authority in the statutory form—namely an appointment in writing—from the number of shareholders necessary " to make up fifteen per cent. of the shareholding affected."

Reading those passages together in the light of the facts and arguments, it seems to me that the learned Master of the Rolls indubitably proceeded on the footing that he must be clothed with authority given, and communicated to him, before he can commence the proceedings by presentation of the petition. Holding the view that I do, and I confess in the light of those decisions I feel clear in my own mind that that is the right view of the meaning of the section, I think it would not be proper for me to postpone the decision of this point on the ground that it is arguable and might be more conveniently dealt with at the hearing of the petition. I think I ought, having reached that decision, to accede to the company's motion to strike out. As I say, I cannot help feeling considerable sympathy for the petitioner, but that is obviously not a matter that can affect a decision depending, as it does, upon the meaning of the words of an Act of Parliament. I therefore order that the petition be removed from the file and struck out, and dismiss the petitioner's summons.

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(1) [1943] Ch. 156.

Solicitors: *Slaughter & May; Ingledew, Brown, Bennison & Garrett.*

H. L. L.

In re KENT & SUSSEX SAWMILLS, LIMITED.

WYNN-PARRY J.
1946
Nov. 4.

Company—Voluntary liquidation—Bank overdraft—Letter directing payment of moneys due under contract into bank—Direction irrevocable without consent of bank—Equitable assignment—Unregistered charge of book-debts—Void in liquidation—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 79 (2.) (*e*).

A company having contracted with the Ministry of Fuel and Power for the supply of logs, applied for and obtained facilities for a considerable overdraft from its bank on the terms of sending a letter to the Ministry directing them to pay all moneys payable to the company under the contract into the bank, to the company's account, such directions not to be revoked without the consent of the bank in writing. A subsequent contract with the Ministry was financed by a letter in the same form. The company in the following year passed a resolution for voluntary liquidation:—

Held that the letters were assignments of book debts to the bank by way of security for the overdraft and not having been registered under the Companies Act, 1929, s. 79 (2.) (*e*) were void against the liquidator in the winding-up.

Bell v. *London & North Western Ry.* (1852) 15 Beav. 548 discussed and distinguished.

ADJOURNED SUMMONS in winding-up.

The summons was taken out by the liquidator in the voluntary liquidation of Kent & Sussex Sawmills, Ld., and raised a question under s. 79 of the Companies Act, 1929 (1).

(1) Companies Act, 1929, s. 79:
(1.) Subject to the provisions of this Part of this Act, every charge created after the fixed date by a company registered in England and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation . . . . and when a charge becomes void under this section the money secured thereby shall immediately become payable.
(2.) This section applies to the following charges . . . . (*e*) a charge on book debts of the company.

WYNN-PARRY J.

1946

KENT AND SUSSEX SAWMILLS, *In re.*

On June 6, 1944, the company entered into a contract with the Ministry of Fuel and Power for the supply to the Ministry by the company of 30,000 tons of cut logs. The company approached their bankers, Westminster Bank, Ld., the respondents, for overdraft facilities in connexion with the carrying out of the contract. The bank was agreeable to provide those facilities on the terms that the company should write a letter to the Ministry of Fuel and Power, which it did under date September 18, 1944. The letter was addressed to the Ministry of Fuel and Power and after referring to the particular contract proceeded as follows: " With reference to " the above-mentioned contract, we hereby authorize you to " remit all moneys due thereunder direct to this Company's " account at Westminster Bank, Ld., Crowborough, whose " receipt shall be your sufficient discharge. These instructions " are to be regarded as irrevocable unless the said bank should " consent to their cancellation in writing, and are intended to " cover any extension of the contract in excess of 30,000 tons " if such should occur."

On September 19, 1944, the letter was sent by the bank to the Ministry and on September 26, 1944, the Ministry replied to the bank acknowledging their letter and in effect expressing their agreement to follow the directions as to payment contained in the company's letter.

In May, 1945, the company entered into a further contract with the Ministry of Fuel and Power for the supply to that Ministry by the company of 70,000 tons of logs. The company made a request to the bank for increased overdraft facilities, which the bank agreed to provide up to the sum of 70,000*l.* on the terms that the company should write a further letter to the Ministry of Fuel and Power, which it did under date June 4, 1945. After referring to the particular contract, the letter proceeded: " With reference to the above-mentioned " contract, we hereby authorize you to remit all moneys due " or to become due thereunder direct to the Westminster " Bank, Ld., Crowborough, for the credit of the company's " account. The bank's receipt shall be your sufficient dis-" charge." Then followed a paragraph similar in all respects to the last paragraph of the letter of September 18, 1944, except that the figure of tons referred to was 70,000 instead of 30,000. This letter was sent by the bank to the Ministry of Fuel and Power and the bank's letter was acknowledged by the Ministry in a letter of June 15, 1945, in which the Ministry stated that payments would be made to the bank in accordance with the authority contained in the company's letter of June 4, 1945. On February 12, 1946, the company went into a creditor's voluntary liquidation. 30,000*l.* then remained owing to the company under the two contracts while the company's overdraft with the bank at that date amounted to 83,674*l.*

J. G. Strangman for the liquidator.

Denys Buckley for the respondent, Westminster Bank.

The arguments appear fully from the judgment.

WYNN-PARRY J. [having stated the facts, continued]: This summons comes before me, in which the liquidator asks for a declaration that the two letters of authority constitute charges on the book debts of the company under s. 79 (2) (*e*) of the Companies Act, 1929, and that, not having been registered under that section—as is admitted—they are void as against the applicant the liquidator. It is admitted on behalf of the bank that the subject matter of the application is properly to be regarded as coming under the heading of book debts within the section and the first point was therefore not taken. That leaves the second point for consideration, namely, whether the transaction evidenced by the two letters of September 18, 1944, and June 4, 1945, respectively, amounted to an out-and-out assignment in each case of the whole of the company's beneficial interest in the proceeds of the respective contracts or whether in each case nothing more was effected than the hypothecation of the respective book debts by the company to the bank by way of security.

It is clear from the authorities that it is the duty of the court to come to a conclusion on what is the substance of the matter and for the sake of convenience I shall test this matter by reference solely to the language of the letter of September 18, 1944. On behalf of the liquidator, Mr. Strangman, as his first point submitted that the proper conclusion is that in this letter there can be found no assignment at all, in which case cadit quaestio. In support of that argument he referred to the case of *Bell* v. *The London and North-Western Ry. Co.* (1). In that case, a railway contractor gave his bankers a letter directing the railway company to pass the cheques which might become due to him "to his account with the bank" and

(1) (1852) 15 Beav. 548, 552, 553.

it was held that that was not an equitable assignment, but that it would have been if it had directed the cheques to be passed to the banker. In his judgment, Lord Romilly M.R. said: "The words of this letter are these: 'You will oblige "'by passing the cheques that may become due on my "'contract No. 1, of the Rugby and Stamford Railway, into "'the National Provincial Bank of England' . . . . I should "have thought that an effectual assignment of all that might "become due to Thomas Burton under that contract had been "made to the bank; but this order directs it to be paid to "the account of Thomas Burton, not therefore, as it appears "to me, doing more than constituting the bank to be Thomas "Burton's agents for the receipt of the money." If the letter of September 18, 1944, had stopped at the end of the first paragraph, then, in my view, it would have followed that this case was completely covered by what was said by Lord Romilly in *Bell* v. *London and North-Western Ry. Co.* (1). I have to consider the effect on this aspect of the matter of the second paragraph, which opens with these words: "These instructions "are to be regarded as irrevocable unless the said bank "should consent to their cancellation in writing." I think that the effect of those words on the matter is really as submitted by Mr. Buckley for the bank, because, as he points out, it appears from the paragraph in *Bell* v. *London and North-Western Ry. Co.* (1) that the Master of the Rolls arrived at the conclusion at which he did in view of the circumstance that, as he said, "An order of that description would always "be revocable by the person giving it, but not so an order "to pay to the third person absolutely."

Effect must be given to those words and in my judgment the proper way of construing this letter, looking at it as a whole, is to bear in mind and never to lose sight of the circumstance that the relationship of the two parties in question, the company and the bank, was that of borrower and lender and that this letter was brought into existence in connexion with a proposed transaction of borrowing by the company and lending by the bank. So regarded, I think the opening words of the second paragraph fall naturally into the picture and that they must be regarded as having been introduced for the protection of the bank. But once that is admitted, it throws light upon the whole of the letter and serves to underline what is obviously equally the intention of

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(1) 15 Beav. 548, 552, 553.

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KENT AND SUSSEX SAWMILLS, *In re.*

the first paragraph, namely, to provide protection for the bank. It therefore appears to me that the result of that is to take this case out of *Bell* v. *London and North-Western Ry. Co.* (1) and to lead to the conclusion that I must treat this letter as amounting to an equitable assignment.

That, however, does not conclude the matter because I have then to investigate the question whether that assignment on its true construction is an out-and-out assignment of the whole of the benefit accruing or to accrue to the company under the contract or whether it is no more than an assignment by way of security. Here, again, I think the truth is to be found by bearing in mind the relationship between the parties. Prima facie, at any rate when one has to look at a document brought into existence between a borrower and a lender in connexion with a transaction of borrowing and lending, one must approach the consideration of that document with the expectation of discovering that the document is intended to be given by the borrower to the lender in order to secure repayment of a proposed indebtedness of the borrower to the lender.

Mr. Buckley for the bank, however, has submitted, in a very attractive argument, that the true view of this matter, particularly when one regards the effect of payments made to a bank on behalf of a customer, is that this letter amounts to a sale by the company to the bank of the whole of the company's interest in the moneys due or to become due under a contract. He points out that the ultimate test of whether this can be said to amount to a security is that one must be able to discover on the face of the letter, either in express words or by necessary implication, an equity of redemption in the company and that, properly read, this letter discloses neither expressly nor by implication any such equity of redemption. As I say, I approach this matter more in the expectation of finding that the parties have brought into existence a document consistent with their relations of borrower and lender rather than finding that notwithstanding those relations they brought into existence a document in which their relationship changed to that of vendor and purchaser. In my judgment, by implication an equity of redemption is to be discovered in the language of the second paragraph. I can see no commercial business reason for the introduction of those words: "These

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(1) 15 Beav. 548, 552, 553.

"instructions are to be regarded as irrevocable unless the said "bank should consent to their cancellation" except upon the basis that the parties did deliberately contemplate that circumstances might arise in which it might become desirable that a cancellation of the instructions should be given by the bank; but the existence of that previous paragraph appears to me to operate strongly to lead to the conclusion that there was nothing in the nature of a sale. One is entitled to test the matter by looking at the situation in September, 1944, unembarrassed by what has happened since and to consider what possibilities were open. Suppose that in fact through one source or another the company's account had become in credit with the bank, is it to be supposed that the parties ever contemplated that notwithstanding that circumstance it should remain entirely a matter for the bank to determine whether it should give its consent to the cancellation of these instructions so that if it did not give that consent then for the rest of the period over which the contract had to be worked out, the payments still had to be paid into the company's account at the bank; so that whatever might have been the change in the friendly relations between the company and its bankers, it would have been compelled to maintain that account with the bank until the contract had been worked out? I recoil from coming to such a conclusion. In my view, if the company's account had come into credit the company would then have been entitled, in the true view of this letter, to require the bank to give the necessary instructions to the Ministry. The Ministry is in no way concerned with the position as between the bank and the company and as between those two parties I can see no ground either at law or in equity, on which the bank could have resisted a request or a requirement by the company to cancel the instructions. That at once shows that there is discoverable in this latter paragraph a true equity of redemption. I think the matter is if anything underlined by the other half of the sentence which is to the effect that the instructions are intended to cover any extension of the contract in excess of 30,000 tons if that should occur.

The authorities, except to the limited extent to which I have referred to them on the first point, really do not help in this matter, which is primarily one of construction, but I should mention that, as is made clear in *Saunderson & Co.* v. *Clark* (1), the requirements of this section, to use the words

(1) (1913) 29 T. L. R. 579.

of Buckley on the Companies Act in the 11th edition at page 173: "cannot be evaded by making what is in fact "a mortgage or charge in form an absolute assignment, or "otherwise adopting a form which does not accord with the "real transaction between the parties." Mr. Buckley very properly pressed on me that the court should not be astute so to construe the letter as to bring it within the terms of the section. On the other hand, looking at the matter as best I can, and giving to it such reality as I can, I think if I were to hold that this was an out-and-out sale I should be guilty of being astute: to extract from what appears to me the reasonably plain language of this section a result which in my view upon its language can never have been intended by the parties.

For these reasons I propose to declare in answer to question 1 of the summons that the two letters of authority which I have read constitute charges on the book debts of the company under s. 79 (2) (*e*) of the Companies Act, 1929, and not having been registered under that section are void as against the appellant.

Solicitors: *Kenneth Brown, Baker, Baker; McMillan & Mott.*

H. L. L.

In re DOMINION STUDENTS' HALL TRUST.

DOMINION STUDENTS' HALL TRUST *v.* ATTORNEY-GENERAL.

EVERSHED J.
1946
Nov. 25

Charity—Education—Students' hostel—Restriction—Dominion students "of European origin"—Colour bar—Objects of charity—Community of citizenship, culture and tradition in British Commonwealth of Nations—Fulfilment—"Impossibility"—Meaning.

A company limited by guarantee maintained a hostel for male students of the overseas dominions of the British Empire. The company asked by summons for the sanction of a scheme by which the charity (the benefits of which were restricted to dominion students of European origin) might be administered as part of a wider charity for the benefit of all such students regardless of their racial origin. The company asked also, by petition, for the confirmation of a special resolution to alter its memorandum of association with respect to its objects by deleting, in a paragraph of the memorandum, the words "of European origin" which immediately followed the word "students":—

Held, in authorizing the scheme and sanctioning the petition, that to retain the condition that the hostel should be confined to members of the British Empire of European origin might defeat the charity's main object of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations, and might antagonize both white and coloured students. It was, therefore, "impossible," within the meaning of that word as used in the authorities, that the intention of the charity should be carried out unless the "colour bar" was removed and, accordingly, it was proper that the court should authorize the scheme and sanction the petition.

In re Weir Hospital [1910] 2 Ch. 124; *In re Campden Charities* (1881) 18 Ch. D. 310 and *In re Robinson* [1923] 2 Ch. 332 considered and applied.

ADJOURNED SUMMONS.

PETITION TO CONFIRM RESOLUTION.

This summons was taken out, and this petition presented, by the charity known as Dominion Students' Hall Trust, a company limited by guarantee, which maintained London House, Bloomsbury, as a hostel for male students of the overseas dominions of the British Empire. The summons asked that a scheme might be sanctioned by which the charity (the benefits of which were, up to the date of this application, restricted to dominion students of European origin) might be administered as part of a wider charity for the benefit of all such students regardless of their racial origin. The petition asked for the confirmation of a special resolution, duly passed at an extraordinary general meeting of the charity on June 19, 1945, that the provisions of the memorandum of association with respect to its objects might be altered by deleting in para. (*a*) of cl. 3 of the memorandum the words "of European origin" in both places where they occurred in that paragraph. In both places the word immediately followed the word "students."

The Attorney-General was respondent to the summons and the petition was served on the Board of Trade.

J. H. Stamp for the charity on the summons. The object of this charity is to promote the ties of Empire. The existence of the "colour bar" is contrary to public policy. Therefore it ought to be removed, as defeating the object of the charity and promoting disharmony. The charity's purpose is to promote community of citizenship, culture and tradition among all members of the British Commonwealth of Nations.

EVERSHED J.

1946

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When the charity was constituted it might have been easier to do that by confining the Hall to members of the Empire of European origin. Times have changed, however, especially since the war of 1939–1945, and if the charity continues to do that now, it may defeat the very object for which it was constituted and may antagonize both white and coloured students, while what it really sets out to do is to keep their good will. Also, if the " colour bar " is removed, the charity's object will not be defeated. Those who are intended to benefit, namely, students of the overseas dominions, will receive not less benefit but more. The correct way to view the matter will be as if there were two charities side by side, one for white and the other for coloured students, being administered simultaneously. Thus, the present is a case in which the court can administer the trusts of the charity cyprès: *In re Weir Hospital* (1) and, unless this " colour bar " is removed, the objects of the charity will prove impossible to carry out within the meaning of " impossible " as used in *In re Campden Charities* (2) and *In re Robinson* (3).

Gordon Brown for the charity on the petition. The alteration in the memorandum which the court is asked to allow by confirming the resolution has the support of 75 per cent. in value of the subscribed capital. That, moreover, is a result achieved on an incomplete circularization of the subscribers, for it has not been possible to circularize them all. Further, there has not been any opposition forthcoming. The position, therefore, is one in which it is proper for the court to confirm the resolution.

Danckwerts for the Attorney-General. The matter has to be considered from the point of view of charity generally and from that of the charity in the present case. From the point of view of charity generally, the principles of charity will be preserved if the scheme is sanctioned and the resolution confirmed. Undoubtedly the continued existence of the " colour bar " will frustrate the purposes of the charity, and the proposals now before the court do not do anything more than end the " colour " bar." They do not run counter to any of the principles which govern charity generally. The Attorney-General takes the view that the application is entirely meritorious and is one to which the court has jurisdiction to accede, and he does not oppose either the summons or the petition.

EVERSHED J. The purpose of both the petition and the

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(1) [1910] 2 Ch. 124.

(2) (1881) 18 Ch. D. 310.

(3) [1923] 2 Ch. 332.

EVERSHED J.

1946

Dominion Students' Hall Trust, In re.

Dominion Students' Hall Trust *v.* Attorney-General.

summons is that a restriction which has hitherto been characteristic of the charity, limiting its objects so as to exclude coloured students of the British Empire, should be removed and that the benefits of the charity should be open to all citizens from the Empire without what is commonly known as the "colour bar." Having regard to the interest of the Inns of Court in Imperial students, I have thought it right to be particularly careful to see that I have jurisdiction to authorize the scheme and to sanction the petition. The proposed removal of the "colour bar" restriction has been put to a substantial number of the subscribers. Owing to the necessities of the case, it has not been possible to put it to all, but those to whom it has been put represent over 75 per cent. in value of the subscription and none dissents from what is now proposed.

It is plain that I have to bear in mind the general proposition contained in the headnote to *In re Weir Hospital* (1), which is to the effect that funds given by a testator for a particular charitable purpose cannot be applied cyprès by the court unless it has been shown to be impossible to carry out the testator's intention. True, the present is not a case of a testator and the court is, perhaps, not quite so strictly limited as in the case of a will. It is true, also, that the word "impossible" should be given a wide significance: see *In re Campden Charities* (2); *In re Robinson* (3). It is not necessary to go to the length of saying that the original scheme is absolutely impracticable. Were that so, it would not be possible to establish in the present case that the charity could not be carried on at all if it continued to be so limited as to exclude coloured members of the Empire.

I have, however, to consider the primary intention of the charity. At the time when it came into being, the objects of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations might best have been attained by confining the Hall to members of the Empire of European origin. But times have changed, particularly as a result of the war; and it is said that to retain the condition, so far from furthering the charity's main object, might defeat it and would be liable to antagonize those students, both white and coloured, whose support and goodwill it is the purpose of the charity to sustain. The case, therefore, can be said to fall within the broad description of impossibility illustrated by *In re Campden Charities* (2) and *In re Robinson* (3)

(1) [1910] 2 Ch. 124.

(2) 18 Ch. D. 310.

(3) [1923] 2 Ch. 332.

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DOMINION STUDENTS' HALL TRUST *v.* ATTORNEY-GENERAL.

There is also this further point. On the facts of the case, as proved in evidence, including particularly the substantial promises received of further financial support if the "colour "bar" is removed, it seems clear that the original class of beneficiaries, so far from being adversely affected by the proposed change, should gain as a consequence. Notionally, there might be two complementary charities, one for white and one for coloured students, both of which the trust could administer and, in practice, should administer, together.

In the circumstances, I am happy to think that I can make the order which I have been asked to make. I am also assisted by the circumstance that Mr. Danckwerts, for the Attorney-General, who has considered the matter from all points of view both of charity generally and of the original subscribers, did not feel that the case was one in which he could offer opposition, either on merits or on jurisdiction.

Solicitors: *Messrs. Freshfields, Leese & Munns; Treasury Solicitor.*

K. R. A. H.

Applied. *Re* A DEBTOR (No. 400 of 1940). [1949] 1 All E.R. 510.

JARRETT *v.* BARCLAYS BANK LIMITED AND ANOTHER.

NASH *v.* JARRETT.

Applied. In re A DEBTOR. 1949 1 Ch. 236

C. A.

1946

Nov. 26, 27

Morton, Somervell and Cohen L.JJ.

Emergency legislation — Mortgage — Mortgagor bankrupt — Mortgagee's realization of security—Application to court for leave to sell—Allegation of undervaluation—Person occupying mortgaged property jointly liable with mortgagor for mortgage debt—Right of objection in those capacities—"Persons affected by the granting of the appli-"cation"—Courts (Emergency Powers) Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 19), *s.* 4, *sub-ss.* 3, 4—*Courts (Emergency Powers) Rules,* 1943 (*St. R. & O.* 1943, *No.* 1113/*L.* 22), *r.* 20, *paras.* 1 (*iv.*), 2, 3.

A wife charged her freehold property to a bank to secure the overdraft on the joint account of herself and her husband. The wife having been adjudicated bankrupt, the husband was authorized by the Official Receiver, as the wife's trustee in bankruptcy, to carry on his own business on the property. No payments in reduction of the increasing overdraft having been made over a considerable period, the bank entered into a conditional contract of sale of the property, and issued a summons under the Courts (Emergency Powers) Act, 1943, for leave to realize the security. The Official Receiver was made respondent to the application, but stated that he had no objection to sale. Neither husband nor wife was made respondent, nor were their names left in chambers

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

C. A.
1946
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pursuant to r. 20, paras. 2 and 3, of the Courts (Emergency Powers) Rules, 1943, as "persons affected." The wife having died without obtaining her discharge, and the bank having sold the property under the contract of sale, the husband, on behalf of himself and as his wife's executor, brought an action against the bank, complaining that no valid permission to sell the property had been obtained under the Act of 1943, and that the price was less than its value:—

Held (1.) that the husband, as executor of his wife, had no locus standi for his complaint that the property had been sold at less than its value, for, all her property having passed to her trustee in bankruptcy under s. 53 of the Bankruptcy Act, 1914, the latter alone had power to deal with her property and the power to complain effectively of the mortgagee bank's actions.

(2.) That the husband, even assuming him to be a tenant at will of the property and not merely a bare licensee, was not entitled as such to object to a sale as being at too low a price, since he had no interest in the proceeds.

(3.) That he was also not entitled to make that objection in his capacity as a person jointly liable for the mortgage debt, since he neither was the owner of, nor had any beneficial interest in, the property on which it was secured.

(4.) That the husband, as executor of the mortgagor, was not entitled under s. 4 of the Act of 1943 or r. 20 of the rules of 1943 to be made a party to the bank's application under the Act or to have any statement as to him as a "person affected" left at chambers.

(5.) That he was similarly not entitled as tenant at will or licensee, since the bank's application was for leave, not to take possession of, but to sell, the property, and he was not "affected" by the exercise of the remedy since his position as against the purchaser would be the same whatever the nature of the tenancy.

(6.) That the husband was further similarly not entitled under r. 20, para. 2, as a person jointly liable for the mortgage debt (*a*) because in that capacity he was not "affected" within the meaning of that paragraph, which included no one who had not a legal or equitable interest in the mortgaged property, and (*b*) because the paragraph, on its true construction, only included persons presently interested in the property, whereas the husband's only interest was a possible future one dependent upon his ability to pay off the mortgage debt.

Decision of Wynn-Parry J., ante p. 54, affirmed.

APPEAL from Wynn-Parry J.

By a legal charge dated April 26, 1939, one Mrs. Jarrett, the wife of the plaintiff in the first action and the defendant in the second, charged certain freehold property to Barclays Bank, Ltd., to secure the joint account of herself and her husband. On May 15, 1940, she was adjudicated bankrupt, the Official Receiver being appointed her trustee in bankruptcy. On May 20, 1940, the husband received authority from the Official Receiver to carry on his own business on the wife's premises. Despite repeated requests from the bank, the husband was unable to make any payments in reduction of the increasing overdraft on the joint account. Early in 1945 the bank agreed the terms of a conditional contract for the sale of the property to one Gerald Kimber Nash, the bank not being required to give vacant possession. On March 22, 1945, the bank notified the Official Receiver, the wife and the husband that 2,290*l*. 0*s*. 4*d*. was due from the husband and the wife on the joint account. The letters to the Official Receiver and to the wife, but not that to the husband, were expressed to be written pursuant to the legal charge. On April 17, 1945, the bank informed the husband's solicitor that they had served the requisite notice under the terms of their security calling in the money on the Official Receiver, and also on the wife and the husband, although they thought that unnecessary, and they referred to the proposed sale of the property. On August 23, 1945, the bank issued a summons under the Courts (Emergency Powers) Act, 1943 (1),

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(1) By s. 1, sub-s. 2 of the Courts (Emergency Powers) Act, 1943: "Subject to the provisions of this "Act, a person shall not be "entitled, except with the leave "of the appropriate court,— "(*a*) to proceed to exercise any "remedy which is available to "him by way of . . . . (v.) the "realization of any security." By sub-s. 4: "If, on any application "for such leave as is required "under this section for the exer-"cise of any of the rights and "remedies mentioned in sub-ss. 1, "2 and 3, of this section, the "appropriate court is of opinion "that the person liable to satisfy "the judgment or order, or to pay "the rent or other debt, or to per-"form the obligation, in question "is unable immediately to do so by "reason of circumstances directly "or indirectly attributable to "any war in which His Majesty "may be engaged, the court may, "subject to the provisions of this "Act, refuse leave for the exercise "of that right or remedy, or give "leave therefor subject to such "restrictions and conditions as "the court thinks proper." By s. 4, sub-s. 3: "Where an application "is made by the mortgagee of any "property for leave to exercise "against the property any . . . . "right or remedy arising by virtue "of a default in the payment of "any mortgage money . . . . the "appropriate court may . . . . "treat any person appearing to "the court to be affected by the "exercise of the right or remedy as "if he were the person liable to "pay the mortgage money or ". . . . were the mortgagor, and "may grant relief accordingly."

By sub-s. 4: "The last fore-"going subsection shall not be "taken as requiring all the per-"sons so affected to be made "parties to the application, and "rules made under this Act . . . . "may provide that, in such cases

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asking for leave to proceed, the summons being addressed to the Official Receiver as sole respondent, and on the same date informed the Official Receiver that they had entered into a conditional contract for the sale of the property for 2,250*l.*, mentioning that the bank had to obtain the court's consent under the Courts (Emergency Powers) Act, 1943; that the Official Receiver had been made a respondent to the application under r. 20 of the Courts (Emergency Powers) Rules, 1943; but that, under the proviso in sub-para. (iv.) of that rule, if the bank obtained from him a written statement that he had no objection to leave being given, the application could be made ex parte. On September 4, 1945, the Official Receiver replied that he had no objection. On October 12, 1945, the wife died without having obtained her discharge. On October 18, 1945, the summons came before the master, neither the husband nor the wife having been made a respondent to it, nor any statement left in chambers giving their names as persons "affected by the granting of the application" within r. 20 of the rules of 1943. The master gave the

"as may be prescribed by the "rules . . . . the application may "be made ex parte."

By r. 20, para. 1 of the Courts (Emergency Powers) Rules, 1943: "Subject to the provisions of "para. 2 of this rule, the persons "to be made respondents to an "application by a mortgagee of "property for leave to exercise "against the property any right "or remedy shall be . . . . "(iv.) Where the equity of "redemption is vested in a trustee, "the trustee: Provided that if the "equity of redemption is vested "in a trustee as trustee in bank"ruptcy and the applicant has "before making the application "obtained from such trustee a "written statement that he has "no objection to the leave sought "being given, the application "may be made ex parte."

By para. 2: "In any appli"cation in which a person who is "not a respondent to the summons "under . . . . para. (1.) . . . . would "be affected by the exercise of "any such right or remedy . . . . "the applicant shall . . . . leave "at chambers . . . . a statement "giving the name of such person "and showing what his interest is "in the mortgaged property, and "the court or a judge may direct "that such person, or any other "person who the court or a judge "may think would be affected by "the granting of the application, "be added as the respondent to "the application."

By para. 3: "If the mortgagee "is uncertain as to what persons "would be affected by the grant"ing of the application, he may "issue the application ex parte, "and . . . . leave at chambers a "statement giving the names of all "persons who he thinks may be "affected and showing the in"terests of such persons, and the "court or a judge may direct "which . . . . are to be made "respondents."

bank leave to sell. On December 12, 1945, the sale was completed, the bank conveying the property to the purchaser for 2,250*l.*

By writ issued on January 25, 1946, the husband, for himself and as the wife's executor, brought an action claiming a declaration that no valid notice under s. 103 of the Law of Property Act, 1925—which regulates the exercise of a power of sale—existed or had at any time existed; that no valid leave of the court under the Courts (Emergency Powers) Act, 1943, had been given entitling the bank to sell the property; and that 2,250*l.* was not a proper price for it. He also claimed rescission and an injunction to restrain the bank from interfering with his occupation of the property.

By writ issued on February 19, 1946, the purchaser claimed against the husband, inter alia, possession of the property, the husband counterclaiming, inter alia, for a declaration, that he was entitled to redeem the mortgage comprised in the legal charge to the bank. The husband contended that the sale was invalid, first on the ground that he and his wife ought to have been joined as respondents to the summons issued under the Courts (Emergency Powers) Act, 1943, or that a statement ought to have been lodged in chambers giving their names as "persons . . . . affected" within the meaning of r. 20, para. 3 of the rules of 1943, and, secondly, on the ground that the bank effected the sale at a price so low as to constitute a fraud on the husband and on the wife's estate. At the end of the opening of the case for the husband in the first action, the preliminary objection was taken that the action was misconceived and could not succeed on either ground.

Wynn-Parry J., held the objection to be well founded, and accordingly dismissed the first action, giving judgment for the purchaser against the husband in the second action.

The husband appealed.

Fortune for the husband.

Milner Holland for the bank.

David Jenkins K.C. and *Cloutman K.C.* for the purchaser.

The arguments were substantially as reproduced in the report of the hearing by Wynn-Parry J., the argument for the purchaser, in particular, being as summarized by the judge in his judgment.

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MORTON L.J. [after referring to the statement of claim in the husband's action :] For the purpose of this judgment I am prepared to construe the husband's statement of claim in the way most favourable to him, that is to say, I am prepared to assume that it amounts to a statement that the husband was a tenant at will of these hereditaments. I am by no means expressing the view that that is its true construction or that that was the actual position. It does not appear that the husband ever paid rent, and he may have been merely a licensee. [His Lordship further referred to the statement of claim, and continued :] It is to be observed that the husband, in his statement of claim, on the construction most favourable for him, claims two branches of relief. First, he contends that the proceedings under the Courts (Emergency Powers) Act were defective because neither he nor the testatrix was made a party, and no statement in regard to them was left in chambers ; secondly, that the sale of the property was at a price grossly under its value. He makes those two complaints in three capacities, first, as I will assume, as a tenant at will of the property ; secondly, as his wife's executor ; and, thirdly, as a person liable on the joint banking account of his wife and himself.

It is plain that the action by the purchaser must depend for its result upon the result of the first action.

When the two actions came on for trial, Mr. Fortune (for the husband) opened the case, read certain correspondence, and then referred the judge to the pleadings. Thereupon, in the words of the judge : " Mr. Milner Holland on behalf of " the bank, and Mr. Jenkins on behalf of the defendant Nash, " took a preliminary point and submitted, upon the basis of " the allegations in the statement of claim, that the whole " action was misconceived and that there was no case to " answer. As that submission, if well founded, would conclude " the whole case, I considered it desirable to hear argument on " that preliminary point before any witnesses were called." The judge considered that preliminary point, and formed the conclusion that it was well founded and that the action should be dismissed.

The proceedings which I have outlined were unusual, but it may well be that, in the circumstances of the particular case, they were well calculated to save expense. There had never been, so far as we are told, any application to strike out the statement of claim, but the bank and the purchaser may well have thought that, although the submission which I have mentioned could be made at the trial, still the statement of claim did not so plainly and obviously fail to disclose any reasonable cause of action that it could be struck out. If they did so think, they were right. The statement of claim set out matters which were properly a subject for legal argument before the judge. In his judgment Wynn-Parry J. referred to some of the letters which had been read by Mr. Fortune; but, in view of the fact that the submission was made simply on the allegations in the statement of claim, I think it right to exclude altogether from consideration the letters in question. In so doing I think that I am really tending to assist the husband, because the judge, having read the letters, came to the conclusion that the husband was nothing more than a licensee, and the letters seem to afford very strong ground for that view.

Dealing simply with the statement of claim, I shall follow the order taken by the judge and consider, first, the contention that the sale should be set aside on the ground that it was effected at a price less than its value. First of all, the judge considered the husband's claim to relief under that head as executor of his wife, who had been, until her bankruptcy, the owner of the property. I entirely agree with the reasons which the judge gave for holding, as he did hold, that in that capacity the husband was not entitled to have the sale set aside. He said: "On the wife's being adjudicated bankrupt, all her "property passed to and vested in the Official Receiver under "s. 53 of the Bankruptcy Act, 1914. Thereafter, only the "trustee could deal with the property; only he could effectively "complain against the mortgagee; only he could settle "accounts with the mortgagee. The bankrupt, the wife, "could not go behind the trustee." The judge then referred to *Re Leadbitter* (1) both in the High Court and in the Court of Appeal, and proceeded: "The mere fact that a bankrupt has "a future interest in a possible surplus does not mean that he "has a present interest and there is, in my view, nothing but "confirmation of this proposition to be found in *Bird* v. "*Philpott* (2), which Mr. Fortune, for the husband, cited in "favour of his argument. In my judgment, therefore "the husband, as the wife's executor, has no locus standi "to assert that the sale was made at an under-value."

The judge then considered, as I now shall, the husband's claim to set aside the sale on the ground that he was a tenant

(1) (1878) 10 Ch. D. 388.

(2) [1900] 1 Ch. 822.

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at will of the property. In my view, it is immaterial for this purpose whether he was a tenant at will or a bare licensee; in neither capacity, in my view, could he possibly object to any sale of the freehold which the mortgagee might care to carry out; he has no interest in that capacity in the proceeds of sale at all, and it did not matter to him as tenant whether the property was sold at a high or a low price.

I now turn to the position of the husband, as regards the alleged sale at less than the true value, in his capacity as a person liable on the joint account of himself and his wife at the bank. Here, again, I entirely agree with the decision of the judge and with the reasons which he has given for it. In my opinion, the husband in that capacity could not object: he was not the owner of the property and he had no beneficial interest in it.

I now come to the Courts (Emergency Powers) Act, 1943 [His Lordship read s. 1, sub-ss. 2 and 4, and s. 4, sub-s. 3, and continued :] Section 4, sub-s. 3, is more directly material to the present case. Reference must be made to the Courts (Emergency Powers) Rules, 1943 in order to see who must be made parties to any such application as mentioned in s. 4, sub-s. 3. The material rule is r. 20. [His Lordship read para. 1, of the rule, and continued :] In the present case, as the equity of redemption was vested in a trustee as trustee in bankruptcy, the trustee was asked whether he desired to oppose the leave being given ; he gave a written statement that he did not object, and the application was made ex parte. In saying that as a matter of history, I am travelling outside the allegations made in the statement of claim, but I am not relying for my decision on any fact outside it. [His Lordship read para. 2 of the rule and continued :] Paragraph 3 deals with the position where the mortgagee is uncertain what persons would be affected by the granting of the application. The only other provision which has any materiality is s. 9 of the Act of 1943, which defines "mortgage money" as including "any part thereof "and any interest thereon," and "mortgage obligation" as "any obligation arising under or by virtue of the mortgage, "other than an obligation to pay the mortgage money."

Having regard to the wording of the Act and the rules, is the husband entitled to complain because neither he nor his wife, the testatrix, was made a party to the summons and no statement as to them was left at chambers? The application was issued while the testatrix was alive, and the order was made

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shortly after her death. First of all, was the husband, as executor of his wife, entitled to object? In my view, he was not, in that capacity. I agree with the reasons which the judge expressed for his decision under that head; I cannot improve upon them. He said: "Treating him first as suing "as the wife's executor, it is, in my judgment, quite plain "that he is not entitled to any relief. At the relevant time "the wife was alive and she was an undischarged bankrupt. "Under r. 20, para. 1 (iv.) there is express provision for "making the trustee in bankruptcy, in this case the Official "Receiver, a respondent, which course was followed. If the "wife also was to be entitled to be heard, it would have had "to be under para. 2 or para. 3. In view of the earlier pro"vision of para. 1 (iv.), it would, in my judgment, be startling "to find that the applicant must bring in the bankrupt or his "or her personal representative. To do so would, I think, "be to increase many-fold the difficulties of administering the "bankruptcy laws, if not to make it impossible. But there is, "of course, a very good reason for not doing so, namely, that "—as appears from the authorities to which I have already "referred—at the date of the application the bankrupt had no "interest in the property, and therefore was not a person in "respect of whom it could be specified, in the statement "referred to in paras. 2 and 3, what her interest was in the "mortgaged property."

As for the husband's position as tenant at will or licensee—and I will assume that he was tenant at will—in my view, his claim under that head must fail. The bank did not apply for leave to take possession of the property, they applied for leave to sell it; and, whatever the nature of the husband's tenancy as against the seller, he would remain in the same position as against the purchaser. He was not, therefore, "affected" by the exercise of that remedy.

The last point is whether the husband can say that, as a person jointly liable for the overdraft, he comes within the rules. In the first place, he is plainly not a person who comes within r. 20, para. 1. As for para. 2, it appears to me (and in this respect I again agree with the judge) that no person comes within that paragraph unless he has a legal or equitable interest in the mortgaged property. I think that that is made reasonably clear by the requirement that the applicant shall leave at chambers "a statement giving the name of such person and "showing what his interest is in the mortgaged property."

Would it be right to say that the husband, because he was jointly liable on the banking account and the mortgage was given by his wife on her property to secure the banking account, had an interest in the mortgaged property? It is suggested that he had, because he might have paid off the bank, and, had he done that, would have been able to stand in the bank's shoes as mortgagee. In my view, it would be stretching the words "interest in the mortgaged property" to an unwarrantable extent to apply them to such a case as that. The words are in the present, "what his interest *is* in the mortgaged "property"; and I think it true to say that the husband, in his capacity as a person jointly liable on the banking account, never had an interest in the mortgaged property, though he could have acquired an interest if he had taken a certain step and paid a large sum of money. If that is so, then he did not come within the rules.

I would add this. Although I should have arrived at that conclusion simply on the wording of the Act and the rules, the earlier cases to which Mr. Milner Holland referred are, in my opinion, of assistance. They are *National Provincial Bank, Ld.* v. *Liddiard* (1) and *In re Application by the Midland Bank, Ld.* (2). In each of these cases it was pointed out that there seemed to be an omission in the Act of 1939. In the circumstances which prevailed, for instance, in the latter case, s. 1, sub-s. 4, of the Act of 1939, which corresponds to s. 1, sub-s. 4, of the Act of 1943, gave no protection to the owner of property who had mortgaged that property to secure another person's debt but who had not himself entered into any covenant for payment of that debt. It seems to me to be very likely that the Act of 1943, no doubt among other objects, had that of giving some relief to a person in that position. The mortgagor is expressly mentioned in r. 20, para. 1 (i.), but the legislature may have had in mind the protection of other persons having a beneficial interest in the property subject to the mortgage. However that may be, I think that, on the construction of the Act and the rules, the husband did not come within them in any of the three capacities which I have mentioned.

The result is that, in my view, the submission of the bank and the purchaser at the trial of the first action was well founded, and that the judge was right in dismissing that action. It follows, and I do not think that Mr. Fortune would contend to the contrary, that the judgment in the second action must be in favour of the plaintiff purchaser. This appeal fails.

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(1) [1941] Ch. 158.

(2) [1941] Ch. 350.

SOMERVELL L.J. I agree, but wish to add a few observations on the one question which I think difficult, namely, whether the relevant rules under the Courts (Emergency Powers) Act, 1943, cover the husband in that he was jointly liable for the debt in respect of which the security, in this case the mortgage, was given. I agree with my Lord that it is r. 20 which must be considered. Section 4, sub-s. 4, of the Act of 1943 contemplates that the rules to be made may restrict the operation of sub-s. 3 in that those who might fall within the words of that sub-section need not necessarily under the rules be persons who have to be made parties. Rule 20, para. 2 has to be considered: what is the effect of the words "what his interest is in the "mortgaged property"? At one time in the course of the argument I thought that those words might be used, in what I may call a popular sense, as the equivalent of "his relation "to the transaction," or some such general phrase. On looking at them carefully, and on considering the cases which Mr. Jenkins suggested that this rule might have been made to cover, I have come to the conclusion that the proper construction of these words is that which has been given to them by my brother Morton. Applying that construction, I do not think that the husband here comes within them.

The cases in question are *National Provincial Bank, Ld.* v. *Liddiard* (1) and *In re Application by the Midland Bank, Ld.* (2). We were invited to assume that the legislature may well have had these cases in mind with other matters. It is to be noted that in the first of those cases Farwell J., in the concluding paragraph of his judgment, expressly raised the question whether a debtor who had not given the security might be a proper party. That was, of course, under the words in the Act of 1939. In the second case, my brother Morton at the conclusion of his judgment had, I think, in mind a slightly different point, though related. I think that he was considering whether the mortgagor, who in that case also was under no personal liability to the creditor, might pray in aid the war circumstances of the debtor. I think it relevant to bear in mind, therefore, that the position of a debtor, in respect of whose debt (or in respect of whose joint liability, in this case) a mortgage had been given on property belonging to somebody else, was directly raised for consideration in the two cases which

(1) [1941] Ch. 158 (2) [1941] Ch. 350.

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we are invited to regard as cases which the legislature, among other points, must have had in mind. I think that that supports the construction which has been put on this rule and with which I am expressing my agreement. If the legislature had intended to make a debtor in that position a necessary party, it would have been extremely easy to say so, and I cannot think that that point would have been left to be covered by words which I think, on the view most favourable to Mr. Fortune's argument, are not apt to cover a case of that sort.

COHEN J. I agree. Mr. Fortune argued that if we had taken a different view on the point of construction of the Act and the rules, he would have been entitled to relief by reason of *Anchor Trust Co., Ld.* v. *Bell* (1). In that case a mortgagee had proceeded to enforce his security without seeking to obtain the leave of the court. Mr. Jenkins sought to distinguish that case on the ground that in the present case there was an order of the court giving leave to sell which remained in force. Having regard to our decision on the main point, I find it unnecessary to express any opinion whether this distinction is well founded.

Appeal dismissed.

Solicitors for husband: *Lake & Son, for Roach, Pittis & Co., Newport, Isle of Wight.*

Solicitors for bank: *Woolley & Whitfield, for John Robinson & Jarvis, Ryde.*

Solicitors for purchaser: *Warren & Warren, for Buckell & Drew, Newport, Isle of Wight.*

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(1) [1926] 1 Ch. 805.

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Dec. 2 and 3
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In re ARNO, DECD. HEALEY AND ANOTHER *v.* ARNO AND OTHERS.

Will — Construction — Annuity — Protective trusts — "Paid without "deduction of income tax up to a maximum of five shillings in the "pound"—Reliefs and allowances of annuitant—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19 (1.) *and* 21 (1.).

A testator by his will gave his grandson an annuity to be held on protective trusts and by a sub-clause provided that "it shall be

" paid without deduction of income tax up to a maximum of five " shillings in the pound." It was not in dispute that so long as the standard rate of income tax did not fall below five shillings in the pound, the trustees must calculate first the sum which, after deduction therefrom of income tax at that rate, would leave the net amount of the annuity bequeathed and then deduct from the gross amount, so arrived at, income tax at the standard rate for the year :—

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Held, that the reference in the clause to deduction of income tax up to a maximum of five shillings in the pound was not merely to a rate, as an arithmetical factor, in the calculation of the gross amount of the annuity, but granted relief against tax borne by the annuitant up to five shillings in the pound. Accordingly, the annuitant must pay over to the trustees the amount of his reliefs and allowances of income tax, attributable to the annuity, in the proportions stated, mutatis mutandis, by Romer J., in *In re Bates* [1946] Ch. at p. 86.

Principles of *In re Pettit* [1922] 2 Ch. 765, applied.

Decision of Roxburgh J. [1946] Ch. 306, reversed.

APPEAL from a decision of Roxburgh J. on an adjourned summons.

The facts and the question at issue were stated by Morton L.J. in his judgment as follows :

Thomas Arno made his will on March 31, 1937. It is interesting, although it may not be relevant, to observe that at that date the standard rate of income tax was 4*s.* 9*d.* in the pound. By cl. 1 of his will the testator appointed the Worshipful Company of Haberdashers, his wife, Beatrice, Frank Gray Healey and Frank Kirby Coppard to be the executors and trustees of his will. The Worshipful Company of Haberdashers was thereinafter called the company.

By cl. 9, sub-cl. (A) : " I give to my trustees free of duty on " my death and on the death of any person interested for life " therein the following four annuities namely—one of 1,600*l.* " and three of 500*l.* each to be increased to 1,200*l.* each as from " the expiration of three years from my death "—then there are certain directions about these annuities which I do not think I need read. By sub-cl. (B) : " The 1,600*l.* annuity shall " be held on protective trusts for the benefit of my wife during " her life and after her death one equal moiety thereof shall be " appropriated to each of my grandsons Thomas Arno and " Samuel Arno whether or not surviving me." By sub-cl. (C) : " One of the 500*l.* (rising to 1,200*l.*) annuities shall be appro- " priated to each of my three grandchildren Thomas Arno, " Samuel Arno and Mary Bertha Arno, whether or not surviving

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"me." By sub-cl. (D): "Each annuity and part of share of an "annuity in this clause directed to be appropriated to any one "of my grandchildren shall be held on such of the trusts next "hereinafter declared as shall at my death be capable of taking "effect in reference thereto (that is to say):—(I.) On protective "trusts for the benefit of such grandchild during his or her life "and after his or her death" then follow certain trusts in favour of the children of the grandchild and other persons, which I need not read. Then by sub-cl. (E): "All the said "annuities shall be primarily charged on my said real estate at "Stoke Newington, Leyton and Eastbourne" then follows an exception which is immaterial—"and shall be paid without "deduction of income tax up to a maximum of five shillings "in the pound." It is on that last short phrase that the questions arising in this case depend. There is in cl. 10 a residuary gift in favour of the company. For the sake of simplicity, I shall take as an example the annuity, now 1,200*l.* a year, which is appropriated to the first defendant, Thomas Arno, the trusts of that annuity at the moment being to pay it to Thomas Arno although under the protective trusts there may hereafter arise a discretion in favour of other persons.

The testator died on May 30, 1937, and his widow died on February 10, 1944, her legal personal representative being the defendant, Norah Goodchild.

In order to see how far the testator's directions in regard to the annuities fit in with the Income Tax Acts, I think it is necessary to refer to rr. 19 and 21 of the All Schedules Rules in the Income Tax Act, 1918. [His Lordship read rr. 19 (I.) and 21 (I.) (1).] It is to be observed that the words used in

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(1) By the All Schedules Rules of the Income Tax Act, 1918, r. 19, sub-r. 1: "Where any yearly "interest of money, annuity, or "any other annual payment .... "is payable wholly out of profits "or gains brought into charge to "tax, no assessment shall be made "upon the person entitled to such "interest, annuity, or annual pay- "ment, but the whole of those "profits or gains shall be assessed "and charged with tax on the "person liable to the interest, "annuity or annual payment, "without distinguishing the same, "and the person liable to make "such payment, whether out of the "profits or gains charged with "tax or out of any annual pay- "ment liable to deduction, or "from which a deduction has been "made, shall be entitled, on "making such payment, to deduct "and retain thereout a sum "representing the amount of the "tax thereon at the standard rate "for the year in which the amount "payable becomes due."

By r. 21, sub-r. 1: "Upon "payment of any interest of "money, annuity, or other annual

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r. 19 are "shall be entitled" but plainly it would be the duty of trustees paying an annuity to make that deduction. The materiality of r. 21 in the present case, as I understand the matter, is that there has in fact been a deficiency of income in certain years since the death of the testator for the purpose of meeting the annuities. The system under the Acts, therefore, is that there is a deduction of tax at the standard rate on payment. The recipient of the annuity, for the purpose of surtax and reliefs, has to make a return of his total income, including therein the gross amount of the annuity payment, and his reliefs are then computed. It is clear, from this brief summary of the statutory provisions, that the words "shall be paid "without deduction of income tax up to a maximum of "five shillings in the pound" do not fit in to the provisions of the Income Tax Acts.

A question has arisen which I must now state, and I think the most convenient way of stating it is to refer to the summons taken out in this case. The first question raised by the summons is: "(*a*) Whether, on the true construction of the "said will and in the events which have happened, the amount "of the annuity payable by the trustees of the said will to each "of the annuitants mentioned in cl. 9 of the said will (whereby "the said annuities were directed to be paid 'without deduction "'of income tax up to a maximum of five shillings in the "'pound') should be ascertained by calculating first the sum "which after deduction therefrom of income tax at the rate of "five shillings in the pound thereon will leave the net amount of "the annuity bequeathed, and secondly, by deducting from "the gross amount so arrived at income tax at the standard "rate in force for the year in which the annuity becomes due." At the hearing before Roxburgh J., both parties were agreed that, so long as the standard rate of income tax does not fall below 5*s.* in the pound, the method of ascertaining the sum to be paid to the annuitant in the first instance should be that set out in the question which I have just read. Accordingly, without argument, as I understand, Roxburgh J., made a

"payment charged with tax under "Schedule D., or of any royalty "or other sum paid in respect of "the user of a patent, not payable "or not wholly payable out of "profits or gains brought into "charge, the person by or through "whom any such payment is made "shall deduct thereout a sum "representing the amount of the "tax thereon at the rate of tax "in force at the time of the payment."

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declaration to that effect. From that part of his order there is no appeal.

The second question is expressed as follows: "Whether on "the true construction of the said will and in the events which "have happened (*a*) each or any of the said annuitants is "entitled to retain for his or her own benefit any reliefs or "allowances by way of repayment of income tax to which he or "she may be entitled; or (*b*) whether each or any of the said "annuitants must account for the said reliefs or allowances or "any (and if any, which) part thereof to the trustees of the "said will." Roxburgh J. answered para. (*a*) of that question in the affirmative and from that decision the company, as residuary legatee, appeals.

W. G. H. Cook for the trustees.

King K.C. and *Jopling* for the residuary legatee. The sole question now at issue is whether the annuitants are entitled to retain any reliefs or allowances, by way of repayment of income tax, to which each may be entitled in respect of that portion of his income constituted by the annuity. In *In re Bates* (1) annuities were bequeathed "clear of all death duties and income "tax up to but not exceeding 5*s.* 6*d.* in the pound, but not sur-"tax," and Charles Romer J., applying the principle laid down in *In re Pettit* (2) held that any sum received by an annuitant from the revenue by way of repayment of tax, attributable to the annuity, must be paid over to the trustees of the estate. *In re Bates* (1) was a case of partial exemption from income tax and if the reasoning of *In re Pettit* (2) is applicable here, the result of this case will be, mutatis mutandis, the result stated by Charles Romer J. in *In re Bates* (1) at p. 86 (*Gray K.C.*, I agree). The decision in *In re Pettit* (2) is also applicable here. As M. L. Romer J. said in that case, it might turn out that the annuitant was not liable to the full rate of income tax, that in his opinion being the true effect of the provisions for relief and abatement contained in the relevant taxing Acts. In that case the sum so set aside and paid to the revenue by the trustees would be too much "and if," he continued (3) "in consequence of this, the "annuitant is repaid the excess by the Special Commissioners, "I cannot understand on what ground it can be suggested that "such excess should be retained by the annuitant who has not "paid it, and not be handed back to the residuary legatees who

(1) [1946] Ch. 83.

(2) [1922] 2 Ch. 765.

(3) Ibid. 770.

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"have." *In re Pettit* (1) was also followed in *In re Maclennan* (2). In *In re Williams* (3) where a testator directed his trustees to set aside out of his residuary estate such proportion thereof as should be sufficient to produce a specified income "without deduction of income tax" and to pay that income to his wife during her life, the Court of Appeal held that the sum to be set aside was such a sum as would produce the specified income after income tax at the current rate had been paid, since the words "without deduction of income tax" had the same meaning as "free of income tax." In *In re Jones* (4) the words of the will were to pay such "an annuity "as after the deducting therefrom income tax at the current "rate for the time being would amount to the clear yearly sum "of 350*l.* free of duty." Eve J. construed the words "at the "current rate" as meaning at the standard rate, distinguished *In re Pettit* (1) and held that the formula for arriving at the relevant gross sum was one in which the only tax factor to be taken into account was the actual figure of deduction at the current rate and that it was not legitimate to import the further factor of recoveries in respect of relief. See the observations on that case by Lord Greene M.R. in *In re Maclennan* (5). The decision in *In re Jones* (4) was one on the particular words of the will in question and can be supported on that ground. Eve J. held that the reference to income tax was a reference to the standard rate of income tax as an arithmetical factor in the calculation of the gross amount of the annuity given and not as merely indemnifying the annuitant against that part of his income tax which was properly referable to the annuity. See the judgment of Uthwatt J. in *In re Williams* (6). The case of *In re Jones* (4) seems to be the only case where the principle laid down in *In re Pettit* (1) has not been applied. Here it is plain that the intention was to indemnify the annuitant against income tax in respect of his annuity up to a maximum of 5*s.* in the pound. The construction of this provision in cl. 9 (E) of the will must be one that will apply where the standard rate of income tax is less than 5*s.* in the pound. On the construction of the will arrived at by Roxburgh J. when the standard rate of income tax was exactly 5*s.* in the pound, an annuitant, say, Thomas Arno, would get more than his annuity of 1,200*l.* per annum. That

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(1) [1922] 2 Ch. 765.
(2) [1939] Ch. 750.
(3) [1936] Ch. 509.
(4) [1933] Ch. 842.
(5) [1939] Ch. 750, 759.
(6) [1945] Ch. 321–2.

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cannot have been the intention of the testator. See also *Inland Revenue Commissioners* v. *Cook* (1); *In re Eves* (2); *In re Reckitt* (3). *In re Tatham* (4), where Evershed J. reviewed the cases, was also cited.

Gray K.C. and *Wilfrid Hunt* for the annuitants: As a matter of construction this is not a case where the principle applied in *In re Pettit* (5) should be followed. The testator directed that an annuity should be paid "without "deduction of income tax up to a maximum of five shillings "in the pound." These words taken as a whole point to the position of the trustees making the payment by deduction and not to the position of an annuitant receiving it. See *In re Maclennan* (6) where Greene M.R. said: "It is perfectly "true that the word 'deduction' taken by itself would appear "to point to the act of deduction as the only relevant matter "to be taken into account, and if that were the true view, the "result would be that the only tax factor which would come into "calculation would be the factor of standard rate of tax." Neither of the two further factors on which Greene M.R. relied for his decision in that case, in departing from the natural meaning of the word "deduction," were present in this case. The decision of Eve J. in *In re Jones* (7) applies here and that decision has been approved by the Court of Appeal in *In re Maclennan* (8). There was here a direction for payment without deduction of tax and as Roxburgh J. said (9): "The eye of the "testator is on the trustees making the payment and not on the "annuitant receiving the annuity." Once the appropriate payment is made, it was not intended that the trustees should have any further concern with the annuitant's tax position. If the trustees receive any part of an annuitant's tax reliefs or allowances, the estate will not have relieved him of income tax to the full extent of 5*s*. in the pound and that is in conflict with the language used by the testator in his will. By reason of the provision for protective trusts, events might happen which would effect the division of an annuity between a number of persons and, if the argument for the residuary legatee is correct, the trustees would have to consider the reliefs and allowances to which each of these persons would be entitled. That indicates that the proper construction here is to regard the reference to the standard rate of income tax as being an arithmetical factor in calculating the gross amount of the annuity given.

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(1) [1946] A. C. 1.
(2) [1939] Ch. 969.
(3) [1932] 2 Ch. 144.
(4) [1945] Ch. 34.
(5) [1922] 2 Ch. 765.
(6) [1939] Ch. 750, 756.
(7) [1933] Ch. 842.
(8)]1939] Ch. 750.
(9) [1946] Ch. 310.

Secondly, the principle underlying *In re Pettit* (1) does not call for any repayment of reliefs and allowances to the trustees of an estate, so long as an annuitant receives less than the stated amount of the annuity. Where an annuitant is, as here, tax free up to 5*s.* in the pound, i.e, where there is partial exemption, the annuitant will always receive less than the stated amount of his annuity, unless and until what Roxburgh J called the annuitant's effective rate of income tax falls to 5*s.* in the pound. The ratio decidendi of the case of *In re Pettit* (1) only applies where there is total exemption from income tax. Where there is only a partial exemption, the presumption should be that the annuity is of a gross sum which, after deduction of tax at the standard rate, leaves the named sum, i.e., the annuitant keeping his reliefs and allowances.

The reasoning of the judgments in *In re Reckitt* (2) shows that where an annuity is given without deduction of tax, the tax referred to does not include surtax and is income tax at the standard rate : this is brought out very forcibly by the statement of Romer L.J. (3) where he states what is the effect of a direction to pay an annuity without deduction.

King K.C. replied.

MORTON L.J. It follows from what I have already said, in stating the facts and the question at issue, that in attempting to construe the phrase in cl. 9 (E) of the will : "and shall be "paid without deduction of income tax up to a maximum of "five shillings in the pound," I cannot construe it on the footing that it is possible for the trustees to carry out literally the directions given to them by the will. It is the duty of the trustees to deduct tax on payment and to deduct it at the standard rate ; and it is not easy to see exactly what the testator intended them to do. If I were construing this will apart from any authority, I should say that he intended that the trustees should wholly indemnify Thomas Arno against the income tax, referable to his annuity, which he actually bears in each year in which the standard rate of income tax is 5*s.* in the pound or less ; and if in any year the standard rate of income tax exceeds 5*s.* in the pound it is intended that the trustees shall partly indemnify Thomas Arno against the

(1) [1922] 2 Ch. 765.
(2) [1932] 2 Ch. 144.
(3) Ibid. 154.

income tax, referable to his annuity, which he actually bears. To give an illustration, if the standard rate of income tax in any year is 6*s*., it is intended that the trustees shall indemnify Thomas Arno against five-sixths of the income tax, referable to his annuity, which he actually bears. By " actually bears " I mean this : from tax on the annuity at the standard rate one deducts all the reliefs, referable to the annuity, to which Thomas Arno establishes his right ; one is then able to say that the resulting sum represents the income tax, referable to the annuity, which has been borne by Thomas Arno in any particular year. That is my impression of the testator's intention, gathered from the words he has used. I will add that I reach a second conclusion, also gathered from the words he has used, apart from authority—that two parts of the testator's phrase make it plain that he did not intend Thomas Arno to be freed from any liability to surtax ; first, his use of the word " deduction " (which is not apt as applied to surtax) and, secondly, the imposition of the maximum of 5*s*. in the pound.

The former of these two conclusions differs from that reached by the learned judge. It seems to me that we have approached the problem from rather different angles. I have endeavoured to concentrate on the question which was conveniently and clearly stated by Uthwatt J. (as he then was) in the case of *In re Williams* (1) Uthwatt J. said : " That question "— that is the question of construction to be determined—" is " in substance whether the reference to income tax is a reference " to the standard rate of income tax merely as an arithmetical " factor in the calculation of the gross amount of the annuity " given by the will, or whether the provision as to income tax " merely indemnifies the annuitant against that part of the " annuitant's income tax (other than surtax) which is properly " referable to the annuity. If construed in the former sense, " the actual income tax ultimately suffered by the owner of the " annuity does not enter into the picture. Tax at the standard " rate is deducted from the gross amount resulting from the " calculation and the annuitant receives x*l*. in cash and the " income tax referable to the gross amount has been paid for " his account." The learned judge then goes on to point out that if the phrase is construed in the latter sense, complete effect cannot be given to the bequest by payment to the annuitant.

Concentrating my mind upon the question as stated by

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(1) [1945] Ch. 321–2.

Uthwatt J., I cannot find in this will that the reference to income tax can be said to be a reference to the standard rate of income tax merely as an arithmetical factor in the calculation of the gross amount of the annuity given by the will. I can find no words in the will which justify me in coming to that conclusion. Roxburgh J., has, I think, approached the problem from a different angle. To give an illustration, he has directed a good deal of attention to what he has described as the annuitant's "effective rate of tax." "By his 'effective "'rate'," he says (1), "I mean this. When the income tax "liability of an annuitant has been finally ascertained in "respect of any financial year, after taking into account all "appropriate reliefs and allowances, it is possible to predicate, "by comparing the total amount of income tax suffered (by "payment or deduction) with the total gross income from all "sources, that the effective rate of tax borne by him has been "at the rate of x shillings in the pound. This rate, of course "(surtax apart), will be less than the standard rate, and it may "be convenient to call it his 'effective rate'." For my part, while entirely accepting these statements, I cannot find that calculating the effective *rate* of tax borne by the annuitant assists me at all in the construction of this will. Following somewhat different lines, Roxburgh J., and I, have arrived at a different result. I may perhaps give an illustration of the difference between the learned judge's view and mine by taking a year in which the standard rate of tax is exactly 5*s.* in the pound. In such a year, on my construction of the will, Thomas Arno would get his 1,200*l.*, and would be wholly indemnified in respect of the tax, referable to the annuity, which he actually bore, but he would not get anything more. On the learned judge's construction, however, he would get something more. See as to this, *In re Pettit* (2).

As the construction of a short phrase like this is so much a matter of first impression, especially when the testator's directions cannot be carried out quite literally, I do not propose to go through the judgment of the learned judge in detail. I propose, however, now to consider the current of authority, assisted by the review of the cases which was given by Evershed J., in the case of *In re Tatham* (3). I turn to the authorities because I think it is as well to see whether the prima facie view that one has formed as to the meaning of the will fits in with the current of authority or seems to constitute a departure from the current of authority. It rarely, if ever, happens that the wording of two wills is exactly the same, but I think it is helpful to see whether the construction which I am disposed to place on this will runs counter to the construction which has been placed on wills somewhat similar in their terms.

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(1) [1946] Ch. 308.
(2) [1922] 2 Ch. 765.
(3) [1945] Ch. 34.

I shall first go to the well known case of *In re Pettit* (1) which I have already mentioned. In that case the testator directed his trustees to stand possessed of the trust premises and the annual income thereof upon trust to pay an annuity of 1,000*l.* free of duty and income tax to his wife, the defendant Jane Pettit, for life. M. L. Romer J. (as he then was) held that the residuary estate of the testator was entitled to such proportion of the reliefs which the annuitant claimed as the annuity bore to the total income of the annuitant. After giving certain figures, the learned judge said this (2): "As has already been "stated, the 1,000*l.* was paid out of income that had already "been brought into charge to tax, the tax having been "deducted at source before the income was received by the "trustees. But, as has often been pointed out, payment "at the source is nothing more than the machinery by which "the revenue collects the tax from the person ultimately "liable to pay, and the rights of the parties are, as between "themselves, precisely the same as though the trustees received "the gross income and had themselves to pay the tax to the "revenue. In that case, and treating the annuity of the "defendant Jane Pettit as the only one payable, the trustees "would in each year have had to set aside in respect of her "annuity such a sum as, after payment of the tax properly "payable thereon, would leave a clear sum of 1,000*l.* Out of "this sum the trustees would pay the tax to the revenue and "the 1,000*l.* to the annuitant. The remainder of the gross "income after payment of tax thereon would belong to the "residuary legatees. It would, however, be impossible for the "trustees to ascertain what rate of tax was ultimately payable "in respect of the annuitant's income, and in any case they "would, under the provisions of the Income Tax Acts, be "bound, in the first instance to treat that income as liable to "the ordinary rate. In the year 1918–19, for instance, when "the ordinary rate of income tax was 6*s.* in the pound, "the trustees would have had in the first instance to set aside "1,428*l.* 11*s.* 5*d.* and to pay 428*l.* 11*s.* 5*d.* to the revenue and

(1) [1922] 2 Ch. 765. (2) [1922] 2 Ch. 769.

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" the balance to the annuitant. But this sum might in the end " prove to be too little or too much. If the annuitant were " liable to pay super tax it would be too little and the proper " proportion of her super tax referable to her annuity would, " when ascertained, have to be paid to her by the trustees and " would so go to reduce the income payable to the residuary " legatees. It might, on the other hand, turn out that the " circumstances of the annuitant were such that she was not " liable in respect of her income to the full rate of income tax, " that, in my opinion, being the true effect of the provisions for " relief and abatement contained in the relevant taxing Acts. " In that case, the sum so set aside and the 428*l.* 11*s.* 5*d.* paid " in the first instance to the revenue would be too much, and " if, in consequence of this, the annuitant is repaid the excess " by the Special Commissioners, I cannot understand on what " ground it can be suggested that such excess should be " retained by the annuitant who has not paid it, and not be " handed back to the residuary legatees who have. If the " annuitant were to retain the excess, she would in the end " have received out of the estate more than 20s. in the pound " on the 1,000*l.* given her by the will."

The reasoning in *In re Pettit* (1) was expressly approved by this court in the case of *In re Maclennan* (2). In that case the court had to construe a deed in which Lady Byrne covenanted to pay Mrs. Boyd " such an annual sum as together with the " amount of the annuity of 250*l.* payable to or for the benefit " of Mrs. Boyd under the will of the testator would, (if such " annual sum and annuity respectively were payable to Mrs. " Boyd absolutely) after deduction of income tax but not sur- " tax, leave in her hands the sum of 500*l.* clear of all deductions " for income tax but not surtax." It was held that the principle of *In re Pettit* (1) applied ; and the Master of the Rolls at the foot of p. 758 expressed approval of the reasoning of M. L. Romer J. in *In re Pettit* (1).

I propose to go straight from that case to the case of *In re Tatham* (3) where Evershed J. reviewed the authorities. In that case the will provided that the trustees should pay to the annuitant free of duty " such a sum in every year as after " deduction of income tax for the time being payable in respect " thereof will leave a clear sum of 350*l.* to begin from my death " and to be payable by equal quarterly payments in advance."

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(1) [1922] 2 Ch. 765.

(2) [1939] Ch. 750.

(3) [1945] Ch. 34.

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Evershed J., after reviewing a number of cases, held that the annuitant was accountable to the trustees for a due proportion (in respect of the annuity) of all reliefs from and allowances of income tax to which she might be from time to time entitled. Next came the decision of Uthwatt J. (as he then was) in *In re Williams* (1) where the words were " free from income tax " at the current rate for the time being deductible at source," and the judge held that the annuitants were liable to account for a due proportion of their reliefs and allowances.

So far the question where the will directs, not a complete indemnity, but a partial indemnity had not been considered, but that question had to be considered by Charles Romer J. in the very recent case of *In re Bates* (2). In that case the testator gave to his wife and two other persons annuities of 1,000*l.*, 500*l.* and 400*l.* respectively " clear of all death duties " and income tax up to but not exceeding 5*s.* 6*d.* in the pound " but not surtax." Charles Romer J. held that the principle of *In re Pettit* (3) applied. After referring to the cases of *In re Pettit* (3), *In re Tatham* (4), and *In re Williams* (1), Charles Romer J. said (5): " In my judgment there is no " sufficient indication in the present will that the testator " had in mind the former of the two conceptions to which " Uthwatt J. refers. It is reasonably clear that the testator " intended to do no more than extend a partial indemnity " to the annuitants, at the expense of his estate, against " the income tax which is found ultimately to be payable " in respect of their annuities. With the standard rate of " income tax at 10*s.* in the pound, he was unwilling that his " estate should be saddled with the heavy burden that a complete indemnity would involve, and that was the reason, and " in my judgment the sole reason, for the introduction of the " limiting words ' but not exceeding 5*s.* 6*d.* in the pound '." In my view *In re Bates* (2) was rightly decided, and those observations apply to the present case, with the exception that in the present case the testator, making his will at a time when the standard rate of income tax was 4*s.* 9*d.* in the pound, was unwilling that his estate should be saddled with the heavy burden that a complete indemnity would involve if and when the standard rate of income tax rose above 5*s.* in the pound. That, I think, was the sole reason why he introduced the limiting words "up to a maximum of five shillings in the "pound." It is common ground before us that, if the reasoning of Charles Romer J. is applicable to the words used in the present will, the result which is set out by Charles Romer J. on p. 86 would also be applicable, mutatis mutandis, to the present will. In my view, it would be drawing too fine a distinction between the words of the present will and the words in the will before Charles Romer J., if I were to arrive at a different result in the present case. Feeling, as I do, that the testator intended to free the annuitant from a proportion of the income tax borne by him, and that he did not intend to free the annuitant from any part of the surtax which might be borne by him, it seems to me that the present case is really indistinguishable from *In re Bates* (1). Further, in my judgment the view which I have formed in the present case is in accordance with the current of authority from *In re Pettit* (2) onwards.

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(1) [1945] Ch. 320.
(2) [1946] Ch. 83.
(3) [1922] 2 Ch. 765.
(4) [1945] Ch. 34.
(5) [1946] Ch. 85.

I shall add this, as the words here are "without deduction of "income tax," and the words in *In re Bates* (1) were "clear of ". . . . income tax." In one case at least this court has not regarded these two phrases as conveying a different meaning: that is the case of *In re Williams* (3). It is true that the court was there considering these phrases from a different point of view, and a different problem had arisen, but Romer L.J., said (4): "Under the clause in question, as I read it, the "trustees are directed to set aside a sum sufficient to produce "the income of 1,000*l.* per annum and to hold the same upon "trust for certain beneficiaries, the first of whom is the widow, "to whom they are to pay the annual sum of 1,000*l.* 'without "'deduction of income tax.' Can that mean anything but "that she is to receive the net amount of 1,000*l.* free of tax?" Greene L.J. (as he then was) in the same case said (5): "The "phrase 'without deduction of income tax'"—referring, of course, to the particular document before him—"has the same "meaning as free of income tax." That strengthens me in my view that the present case is not really distinguishable from the case of *In re Bates* (1).

I should mention one other case which I think stands alone, but which has been expressly approved by this court in the case of *In re Maclennan* (6): that is the decision of Eve J. in *In re*

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(1) [1946] Ch. 83.
(2) [1922] 2 Ch. 765.
(3) [1936] 1 Ch. 509.
(4) Ibid. 513.
(5) Ibid. 514.
(6) [1939] Ch. 750.

Jones (1). That was a case, to my mind, of a very different character. In that case the trustees were directed to pay or apply for the benefit of the daughter of the testatrix, Mabel Lloyd Jones, such an annuity as, after deducting therefrom income tax at the current rate for the time being, would amount to the clear yearly sum of 350*l.* free of duty. That seems to me to be a case which comes precisely within Uthwatt J.'s first category; a case where the reference to "income tax" is a reference to the standard rate of income tax merely as an arithmetical factor in the calculation of the gross amount of the annuity given by the will. It is, I think, on that footing that it was approved in this court in the case of *In re Maclennan* (2).

For these reasons, I am unable to agree with the decision of the learned judge or to accede to the argument put before us by Mr. Gray and Mr. Hunt. I should, however, refer to one argument put forward by Mr. Hunt which is directed to a different part of the will. Mr. Hunt pointed out that, although Thomas Arno is at the moment in receipt of his annuity, in events which may happen that annuity will be applicable, at the discretion of the trustees, among a number of persons; and he suggested that that is an indication that the construction which the appellants seek to put upon this will is the wrong construction. I appreciate the point, but it does not shake me in the view which I have formed of this will. If the principle of *In re Pettit* (3) applies, it does happen that many inconveniences result; the trustees have to inquire into such matters as the total income of the annuitant, and the reliefs which the annuitant receives. If the protective trusts here come into operation, the only result is that those inconveniences may be somewhat increased, because if the trustees decide to split the annuity amongst, let us say, three persons, there will have to be a consideration of the reliefs received by each of these three persons. That is merely an extension of the inconvenience which is always caused where the decision in *In re Pettit* (3) is held to apply to a will.

For these reasons, I think that this appeal must be allowed, and that the order should be on the same lines as the order made by Charles Romer J. in the case of *In re Bates* (4).

SOMERVELL L.J. I agree with the judgment which has just been delivered, and the reasons given in it for the conclusion which we have reached; but, as we are differing from the learned judge, I will add a few observations of my own. In dealing with provisions of the kind in question in this appeal, there are two possible constructions, as appears from the cases: first, the provision may be construed as conferring an annuity of a gross sum which, after deduction of tax at the standard rate, leaves the named sum. Such a construction, as my Lord has pointed out, was put upon the words in question in the case of *In re Jones* (1). When the annuity falls into that category, any reliefs or allowances which the annuitant may recover from the Inland Revenue do not enter into the picture; they are retained by him and the payer is not concerned with that. The second possible construction, I think, if I may say so, is very well set out in a sentence in Romer L.J.'s judgment in the case of *In re Reckitt* (2). In that case the court came to the conclusion that the annuitant was to be indemnified against surtax as well as against income tax. There is, therefore, a reference to surtax in the sentence which I am going to read. I might perhaps say that, in my view—and, indeed, neither counsel contended the contrary—the words with which we have to deal, whatever their construction as between the appellant and the respondent, cannot be regarded as referring to surtax. I think that is clear for two reasons: firstly, the reference to "deduction"—there is no question of surtax being "deducted"—and, secondly, perhaps, the reference to "5*s.*" which, in my opinion, is a reference to a standard rate. Whereas, of course, there is a standard rate of income tax, there is no standard rate of surtax. Therefore, in applying the sentence, which I am going to read, to the circumstances of the present case, one disregards Romer L.J.'s reference to surtax. He says (3): "It"—that is the gift which he was construing—"is, indeed, a gift to the annuitant of such a sum as will, after "all questions as between the annuitant and the Crown in "respect of income tax and super tax for that year have been "settled, leave the annuitant with the sum mentioned." Where that is the true construction, as income tax at the standard rate is deducted in respect of the whole amount of the annuity when it is paid over, the proper proportion of any reliefs or allowances which the annuitant may recover from the revenue has to be accounted for to the payer, on the principle laid down in *Pettit's* case (4), to which reference has already been made.

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(1) [1933] Ch. 842.
(2) [1939] Ch. 750.
(3) [1922] 2 Ch. 765.
(4) [1946] Ch. 83.

(1) [1933] Ch. 842.
(2) [1932] 2 Ch. 144.
(3) Ibid. 153.
(4) [1922] 2 Ch. 765.

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Somervell L.J.

The question in the present appeal is whether the words used in this will fall within category 1 or category 2. I think myself it is worth bearing in mind that the formula for category 1 is a formula which is very familiar because for some years now it has been very common for people to enter into covenants for annual payments to charities on the lines of category 1. I think, therefore, the fact that the formula to produce the first result is so familiar may raise some presumption in favour of construing words which are dissimilar to that formula as words which are intended to bring about the result which I have set out and referred to as category 2. I am not saying, of course, that it is not possible for words to be used which, though not the usual and familiar formula, lead to the same result.

I do not propose to go through the cases, to the most important of which my Lord has already referred; but I think, reviewing them as a whole as well as, I hope, giving all due weight to them in detail, that they rather tend to support the view that words, some of them inapt, as in this case, have usually been construed as bringing about the second result to which I have referred unless they clearly bring about the result which was arrived at in *In re Jones* (1). I would like to say a word or two about an argument which I think weighed with the learned judge, and which was pressed upon us by Mr. Gray in the course of this appeal. The argument was this, that where you find, as here, a partial exemption from tax, you should approach it with a presumption that probably you will find that the construction is the category 1 construction. I myself do not feel that the fact that it is a partial exemption leads to that presumption or to that approach. It seems to me perfectly natural that a testator, or a covenantor, should wish to bring about this result, namely, that, so long as income tax does not exceed a certain amount, the annuitant should get a complete indemnity, no more and no less, in respect of the income tax which he actually bears attributable to the annuity which he is getting, but that if income tax exceeds that amount then he should bear his own tax. As I say, on that matter I differ from the learned judge. Though he gave other reasons for his conclusion, it may be that that is one of the factors, and I think it was, which led him to arrive at a different conclusion from that to which I have come.

As has been pointed out, the words in the present case are

(1) [1933] Ch. 842.

inapt, in that trustees cannot pay the sums in question without making the deductions that they are entitled to make under r. 19 or are compelled to make under r. 21, of the All Schedules Rules of the Income Tax Act, 1918; and, as I understand that in the present case the annuity is being paid partly out of capital and partly out of income, r. 21 is applicable.

Turning then to the words in the will, I attach some importance, though perhaps not very much, to the fact that the named sums are set out in previous paragraphs in the will before one comes to the dozen or so words at the end of cl. 9 (E) which have given rise to the present dispute. Those words, to my mind, plainly do not point to category 1, and I think the natural meaning to give them is the meaning which I have already sought to state, and will not repeat, under category 2. In the result, that seems to me to be the natural construction and in accordance with the authorities which were cited to us, and the appeal, therefore, in my opinion, should be allowed. I have given my reasons for saying that I think they clearly do not apply to surtax, and I do not desire to add anything further on the other arguments in the case.

COHEN L.J. I also agree that the appeal should be allowed, and for the reasons stated by my brethren, but, as we are differing from the learned judge, I will state, shortly, my reasons for reaching that conclusion. Mr. Gray sought to support the decision of the learned judge upon two grounds; firstly (and this is the argument to which my brother Somervell referred) he argued that the ratio decidendi of *In re Pettit* (1) only applies where there is total exemption from tax. He went on to say that, where it was a partial exemption, the bias should be the other way. I do not think that that argument is well founded. I will take as the ratio decidendi that portion of Romer J.'s judgment to which Mr. Gray himself referred. He said (2): "I cannot understand on what ground it can be "suggested that such excess"—that is, the excess over the sum stated—"should be retained by the annuitant who has not "paid it, and not be handed back to the residuary legatees "who have." I see no reason in principle why this ratio decidendi should not apply also in the case of a partial exemption. If the annuitant has only borne part of the tax, why should he retain the whole of the allowances and reliefs?

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(1) [1922] 2 Ch. 765.

(2) Ibid. 770.

Secondly, Mr. Gray presented an argument on the construction of the particular will, and he relied, in particular, on the fact that sub-cl. (E) (which is the material paragraph of the will) directed that the annuity should be paid " without " deduction of income tax up to a maximum of 5*s*. in the " pound." He admitted that neither the direction to pay nor the words " without deduction of income tax " would by themselves have justified us in holding that *In re Pettit* (1) does not apply; but he said that, taken as a whole, it pointed clearly to the position of the trustees making the payment and not to the position of the annuitant receiving it. He relied upon a passage in the judgment of the Master of the Rolls in *In re Maclennan* (2), where he said : " It is perfectly true that the " word ' deduction ' taken by itself would appear to point to " the act of deduction as the only relevant matter to be taken " into account, and if that were the true view, the result would " be that the only tax factor which would come into calculation " would be the factor of standard rate of tax " ; and he pointed out that neither of the two factors on which the Master of the Rolls relied in that case are present here, at any rate expressly, so as to justify us in departing from the normal and natural meaning of the words. But, as my brother Morton L.J., pointed out, it is plainly impossible to give effect to this clause in the will in its strict sense, having regard to the provisions of the Income Tax Acts, and we really have to consider in what sense, other than the prima facie meaning of the words, we ought to construe them.

I approach the problem from the point of view stated by Uthwatt J. in the case of *In re Williams* (3), to which Morton L.J. referred. I will not read the citation from the judgment again. Suffice it to say that I do not think we are justified in treating this case as falling within the first category, which is the *In re Jones* (4) category. The will gives an annuity of 1,200*l*. a year. If the matter had rested there, the annuitant would have borne tax at the standard rate. The effect of sub-cl. (E), in my view—and I do not wish to repeat the reasons given by my brethren—is merely to grant relief against tax borne by the annuitant up to 5*s*. in the pound. If that is the right view, I think as Charles Romer J. did in *In re Bates* (5), that the principle in *In re Pettit* (1) should apply, and that the

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(1) [1922] 2 Ch. 765.
(2) [1939] Ch. 750, 756.
(3) [1945] Ch. 321–2.
(4) [1933] Ch. 842.
(5) [1946] Ch. 83.

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order ought to take the form of the order made by him in that case.

Appeal allowed.

Solicitors for the trustees: *Eagleton & Sons.*
Solicitors for the residuary legatee: *Eagleton & Sons.*
Solicitors for the annuitants: *Field, Roscoe & Co.*

C. G. M.

APLEY ESTATES COMPANY LIMITED *v.* DE BERNALES AND OTHERS.

C. A.
1946
Nov. 29.
Morton, Somervell and Cohen L.JJ.

Tort—Joint tortfeasors—Action for conspiracy to defraud—Agreement not to sue one—Court order incorporating agreement and staying action against that defendant—Other defendants not released.

An agreement by plaintiffs not to sue or continue to sue one of several alleged joint tortfeasors which is incorporated in an order of the court staying the action against that defendant does not constitute a release of the plaintiffs' cause of action against that defendant so as to release the other alleged joint tortfeasors.

Duck v. *Mayeu* [1892] 2 Q. B. 511 applied.

APPEAL from Evershed J.

An action was brought by three hundred and nine plaintiffs against the defendant de Bernales and thirty-four other defendants, including the Great Boulder Proprietary Gold Mines, Ld., alleging several causes of action, including conspiracy to defraud in regard to certain alleged gold mines in Western Australia. Before the action came on for trial, terms of settlement were agreed between the plaintiffs and the Great Boulder Company and were embodied in an order made by Evershed J. on January 16, 1946, by which it was ordered that all further proceedings in the action against the Great Boulder Company be stayed except for the purpose of carrying the said terms into effect, for which purpose liberty was given to apply. The terms of the settlement were as follows: "(1.) In consideration of "the payment of 25,000*l.* by the defendants the Great Boulder "Proprietary Gold Mines, Ld. to Messrs. Norden and Company "the solicitors for the plaintiffs for and on behalf of the plaintiffs "in the above mentioned actions the receipt whereof Messrs. "Norden & Company hereby acknowledge the plaintiffs in the "said actions will not nor will any of them sue or continue to "sue the said defendants in respect of any of the matters the

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"subject matter of the said actions or either of them or in "respect of their respective claims in respect of such matters "or any of them but this agreement shall not be construed or "operate as a release of any cause of action of the plaintiffs or "any of them against the defendants or any of them in the "said actions or either of them and shall not prejudice or affect "the rights of the plaintiffs therein to proceed with their claims "therein against the defendants other than the defendants "the Great Boulder Proprietary Gold Mines, Ld. (2.) The "plaintiffs and the defendants the Great Boulder Proprietary "Gold Mines, Ld. hereby consent to the making of an order in "each of the said actions whereby all further proceedings "therein against the said defendants be stayed upon the above "terms each party bearing his or her or their own costs."

Later, application was made by certain of the other defendants by summons for leave under R. S. C. Or. 24, r. 2, to put in a new matter of defence, and, by a further summons, that, on the basis that the new defence was put in, the points of law raised therein should be set down for hearing and disposed of forthwith. The new defence and points of law were that the effect of the agreement with the Great Boulder Company was to put an end altogether to so much of the claims as the plaintiffs had against the defendants as joint tortfeasors on the ground that at common law the release of one joint tortfeasor released all the tortfeasors. By consent the points of law were heard as though the defendants had obtained leave to deliver the new defence.

The matter came before Evershed J. on July 25, 1946.

On July 30, 1946, Evershed J. gave judgment. He held that on the construction of the agreement it was not intended to have, nor did it have, the effect of making the acceptance by the plaintiffs of 25,000*l*. an accord and satisfaction of their claim against the Great Boulder Company, but that on a fair construction of the language the bargain was that, in consideration of 25,000*l*. paid to the plaintiffs' solicitors, the plaintiffs covenanted not to sue or continue to sue the Great Boulder Company in respect of the particular matter in question. He further held that there was no reason why persons should not enter into a bargain such as the bargain in question just as well after action brought as before action brought and that the effect of the transaction was not the same as payment into court. In *Duck* v. *Mayeu* (1) the Court of Appeal decided that such an arrange-

(1) [1892] 2 Q. B. 511.

ment made before action brought did not have the effect of releasing the tortfeasors other than the tortfeasor with whom the arrangement was made and it seemed to him that the fact that no action had been brought in that case was not a material circumstance underlying the court's decision. That view was supported by the language of Vaughan Williams L.J. in *Rice* v. *Reed* (1). He therefore held as a matter of law and on the construction of the agreement that the arrangement made did not operate as a release or an accord and satisfaction in respect of any of the defendants joined as joint tortfeasors with the Great Boulder Company on the claim for conspiracy.

The defendants appealed.

MacKenna (*Slade K.C.* with him) for the defendants. Any act of a plaintiff which discharges the liability of one of two or more joint tortfeasors discharges the others: *Dufresne* v. *Hutchinson* (2); *Thurman* v. *Wild* (3). A tortfeasor is discharged from liability if the plaintiff is precluded from recovering judgment against him. That is the true test. In the present case the agreement not to sue, the payment of the money under that agreement and the order of the court staying the action have effectively precluded the plaintiffs from ever recovering judgment against the Great Boulder Proprietary Gold Mines, Ld. Therefore that defendant is discharged and the other defendants are automatically discharged from liability for all the joint torts alleged against them and the Great Boulder Company. It is admitted that a mere covenant not to sue one joint tortfeasor does not discharge the others (*Lacy* v. *Kinnaston* (4); *Duck* v. *Mayeu* (5)), but the reason for that is that such a covenant does not preclude the covenantor from recovering judgment against the covenantee, although doing so would be a breach of covenant: see *Hutton* v. *Eyre* (6). Here there was something more than a mere covenant not to sue, because there was an order of the court staying the action.

David Jenkins K.C. and *J. F. Bowyer* for the plaintiffs. The foundation of the rule that the release of one joint tortfeasor releases the other joint tortfeasors is the indivisible nature of the cause of action, and nothing short of the complete extinguishment of the cause of action will release the other joint

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(1) [1900] 1 Q. B. 54.
(2) (1810) 3 Taunt. 117.
(3) (1840) 11 Ad. & E. 453.
(4) (1701) 3 Salk. 298.
(5) [1892] 2 Q. B. 511 513.
(6) (1815) 6 Taunt. 289.

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tortfeasors. Here, although the action has been stayed as against the Great Boulder Company, the cause of action has not been extinguished. The mere compromise of a claim does not operate as a release of a joint tortfeasor: *Rice* v. *Reed* (1). It was not the intention of the parties that the agreement with the Great Boulder Company should release the other defendants and to see what was the intention of the parties the court is entitled to look at the correspondence. If the effect of the agreement was not to release the other defendants it cannot matter whether it was entered into before or after action brought.

MacKenna replied.

Morton L.J. So far as the wording of the terms of settlement between the plaintiffs and the defendant, Great Boulder, as I shall call them, is concerned, it is perfectly plain that the intention of the parties was that they should not operate as a release or extinguishment of the cause of action against the defendant Great Boulder, but that they should operate merely as an agreement not to sue Great Boulder. No doubt the agreement was put in that form so that the other persons who are alleged to be joint tortfeasors should not be released from their liability to the plaintiffs. However, the defendant de Bernales, in certain proceedings which I need not describe in detail, contends that whatever may have been the intention of the parties to that agreement, the effect of it in law is that he is released from any liability to the plaintiffs in respect of the alleged torts in which he was alleged to be a joint tortfeasor with the Great Boulder Company. The case came before Evershed J., who rejected that contention, and the defendant de Bernales appeals. I find myself entirely in agreement both with the decision of Evershed J., and with the reasons on which that decision is based, but the case has been so ably and fairly argued by Mr. MacKenna before us that I shall add a few words.

The law applicable to the matter is stated by A. L. Smith L.J., in the case of *Duck* v. *Mayeu* (2). I think it is unnecessary to go back to the earlier cases to which our attention was directed. A. L. Smith L.J. said this: " It is, we think, clear law, that a " release granted to one joint tortfeasor, or to one joint debtor, " operates as a discharge of the other joint tortfeasor, or the " other joint debtor, the reason being that the cause of action,

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(1) [1900] 1 Q. B. 54.

(2) [1892] 2 Q. B. 511, 513.

"which is one and indivisible, having been released, all persons "otherwise liable thereto are consequently released. The case "of *Cocke* v. *Jennor* (1) is distinct upon the point, and there "are many subsequent cases to the same effect. It has also "been held that a covenant not to sue one of two joint debtors "does not operate as a release to the other joint debtor"—and then he cites the case of *Hutton* v. *Eyre* (2)—"the reason "being that the joint action is still alive. We have found no "case in which it has been held that a covenant not to sue "releases a joint tortfeasor; and in our judgment the principle "upon which it has been held that such a covenant does not "release a joint debtor applies to the case of a joint tortfeasor. Mr. MacKenna is, of course, constrained to admit that the mere agreement not to sue the Great Boulder Company could not operate as a release to the defendant de Bernales. He says that the true test is whether the plaintiffs could, after the order to which I have referred, recover judgment against the Great Boulder Company, and that, if they could not recover judgment against the Great Boulder Company, that operates as a release to Mr. de Bernales. I do not take that view. The reason why a release granted to one joint tortfeasor releases other joint tortfeasors is, as A. L. Smith L.J. said, that the cause of action is one and indivisible, and it must necessarily follow that a release of that cause of action against one is a release of that cause of action against all. That is a rule which, in my judgment, should not be extended beyond the limits within which it has hitherto been confined. It is a rule which has often operated to work hardship and I, for one, am certainly not prepared to extend it in any way. The only ground upon which Mr. MacKenna can rely in this case is that the proceedings were stayed by the order to which I have referred. Owing to certain procedural difficulties it may be that the plaintiffs, after that order, could not successfully attempt to sue the Great Boulder Company, but, in my judgment, the imposition of that stay does not have the effect of extinguishing the cause of action against Great Boulder. Having regard to the reasons on which the rule is founded, I do not accept the argument that by reason of that order the cause of action against Mr. de Bernales is extinguished. Such a result would, of course, be entirely contrary to the intention of the parties to the agreement embodied in the order, but if that were the result of the order as a matter of law, we should be bound to allow this

(1) (1614) Hob. 66.

(2) 6 Taunt. 289.

appeal. In my judgment, that is not the result as a matter of law. Inability to recover judgment against one of two tortfeasors may be due to the fact that the cause of action against that tortfeasor is extinguished, but it may be also due to other reasons. It is a non sequitur to say: "A. cannot recover "judgment against one joint tortfeasor and therefore the cause "of action is extinguished against all the joint tortfeasors." In my judgment, this appeal should be dismissed.

SOMERVELL L.J. I agree. It may be worth mentioning at the outset that the court was told by Mr. MacKenna that the joint torts relied on in the statement of claim were torts which occurred before 1935 and, therefore, the Law Reform (Married Women and Tortfeasors) Act, 1935, does not in any way come into the argument in this case. I am not saying, nor indeed is it suggested, that that Act does affect the issues. It may or may not. It seems, however, desirable to make clear that the torts complained of were before that alteration in the law was made. Mr. MacKenna agreed that in the agreement which was come to between the plaintiffs and the Great Boulder Proprietary Gold Mines, Ld., the plaintiffs had done their best to keep their rights against the other defendants alive. He submitted, however, that effect could not be given to this intention if they had, in the events which have happened, precluded themselves from obtaining judgment against them. He submitted as a proposition that an act discharges a tortfeasor from liability if it precludes the plaintiff from recovering judgment. I think that is really putting the issue the wrong way round. I think the question which has to be considered is: Under the terms of the agreement or having regard to any act which may have been done, for instance taking out money which has been paid into court, has the plaintiff discharged the cause of action which he previously possessed, bearing in mind, of course, the principle which has been already stated by my brother Morton, that the cause of action against joint tortfeasors is one and indivisible. Mr. MacKenna referred to a statement which, I think, so far as I follow the report, is in a note on *Lacy* v. *Kinnaston* (1). In the course of the note it is said that in a case where there are two joint tortfeasors and one of them has entered into a covenant with the plaintiff under which the plaintiff covenants never to sue him, that covenant could not be pleaded in bar if the plaintiff sought to take

(1) 3 Salk. 298.

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proceedings against both tortfeasors. The only course would be for the action to proceed and for the covenantee, either in that action or, possibly, and I think more probably, by bringing an action subsequently, to sue on the covenant for damages. I do not think that it is clear that under the procedure in force at present the covenantee could obtain an injunction against the plaintiff. I express no opinion on that, because it seems to me that this question cannot fall to be determined according to whether under the current rules of procedure and in the light of what may have happened between the parties, a plaintiff may or may not have put himself in a position in which the courts would not allow him to proceed to judgment. In my opinion, the court must direct its mind to what has taken place with regard to the tortfeasor with whom the covenant has been made. In doing that in the present case it seems to me clear that the plaintiffs have not, under the agreement made with the Great Boulder Proprietary Gold Mines, Ld., released their cause of action. They have not in the technical sense discharged the Great Boulder Proprietary Gold Mines, Ld., and they are, therefore, free to proceed with their cause of action against the other defendants. I agree that the appeal should be dismissed.

COHEN L.J. I agree so entirely with what has been said by my brethren and by the judge in the court below that I do not desire to add any observations of my own.

Appeal dismissed.

Solicitors for the appellants: *Norden & Co.*
Solicitors for the respondents: *Birkbeck, Julius, Edwards & Coburn.*

H. A. P.

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pproved and applied. FLOOD *v.* LOOD. [1948] 2 All E.R. 712.

In re KINSETH. KINSETH *v.* KINSETH.

VAISEY J.

1946
Dec. 20.

Justices — Practice — Infants — Custody — Maintenance — Overlapping statutory provisions—Jurisdiction—Married Women (Maintenance) Act, 1920 (10 & 11 *Geo.* 5, *c.* 63), *s.* 1—*Guardianship of Infants Act,* 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 7, *sub-s.* 1 (*c*).

A married woman, who had been deserted by her husband, obtained an order for the payment of money for her use, under the Summary Jurisdiction (Married Women) Act, 1895. She refrained, however, from also applying under the Married Women (Main-

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tenance) Acts, 1895 and 1920, for an order for the custody and maintenance of her children, as she was advised that she might obtain a more advantageous order under the Guardianship of Infants Acts. She, therefore, made an application for that purpose under the latter statutes, which the magistrates refused, being of opinion that it would be an evasion of the law for her to make use of the Guardianship of Infants Acts in addition to the Married Women (Maintenance) Acts, 1895–1920, and that they had no jurisdiction to make the further order.

Held, on appeal, that the magistrates had taken a wrong view; that the married woman was entitled to elect to proceed under the Guardianship of Infants Acts; and that she was entitled to an order on that basis.

APPEAL from Essex justices.

A married woman, who had been deserted by her husband, obtained an order by the magistrates, under the Married Women (Maintenance) Acts, 1895 and 1920, that her husband should pay, for her use, the weekly sum of 2*l.* Being advised that she could obtain a more advantageous order against him for the custody and maintenance of her children under the Guardianship of Infants Acts, 1886 and 1925 (1), than she could have obtained under the former statutes, she took out a second summons, under the latter statutes, for an order for custody and maintenance.

The magistrates refused the application and certified as their reasons that " it would be an evasion of the law to use both these " statutes and the Guardianship of Infants Acts at one and the " same time, and, therefore, the justices hold that they have " no jurisdiction to make a further order under the latter Acts."

The wife appealed, by motion in the Chancery Division of the High Court against the decision of the magistrates.

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(1) By the Summary Jurisdiction (Married Women) Act, 1895, s. 4: " Any married woman " whose husband . . . . shall have " deserted her . . . . may apply to " any court of summary jurisdiction . . . . for an order or " orders under this Act . . . "

Section 5: " The court of " summary jurisdiction to which " any application under this Act " is made may make an order or " orders containing all or any of " the provisions following, viz.:— " (*b*) A provision that the legal " custody of any children of the " marriage between the applicant and her husband, while " under the age of sixteen years, " be committed to the applicant; " (*c*) A provision that the husband " shall pay to the applicant personally or for her use, to any " officer of the court or third person on her behalf, such weekly " sum not exceeding two pounds " as the court shall, having regard " to the means both of the husband " and wife consider reasonable."

By the Married Women (Maintenance) Act, 1920, s. 1: " An " order under s. 4 of the Summary

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H. B. Grant for the appellant.

The respondent (the husband) did not appear and was not represented, as he had been represented by a solicitor before the magistrates and had agreed to the proposed order.

VAISEY J. In this case the magistrates have refused to make an order committing the custody of a child of twelve years of age to the mother and an order giving that mother a sum of money for the child's maintenance, on the ground of lack of jurisdiction. The point appears to involve a supposed overlapping of statutory provisions which arises in this way. The Summary Jurisdiction (Married Women) Act, 1895, enables the legal custody of the children to be given to the mother, but it does not appear to include any specific provision for the payment to her by her husband of money for the children's maintenance. By an amending Act of 1920, called the Married Women (Maintenance) Act, 1920, it is enacted that an order under the Act of 1895 may include a provision that the husband should pay to the applicant a weekly sum not exceeding 10*s.* for the maintenance of each child of the marriage until such child attains the age of sixteen years. Therefore, under those two Acts, which are undoubtedly still on the statute book, a wife, situated as the applicant in this present case is, having been deserted by her husband, may obtain an order for the legal custody of her infant children, payment of the sum of 2*l.* a week for herself and a payment of 10*s.* for the maintenance of each of her infant children.

If, therefore, the wife made the whole of her application under the Married Women (Maintenance) Acts, 1895 and 1920, she was limited to 10*s.* a week for each child, whereas, under the Guardianship of Infants Act, 1925, she might obtain 1*l.*

" Jurisdiction (Married Women) " Act, 1895 . . . . may, in addition " to any other provision authorized " by the Act, include a provision " that the husband shall pay to " the applicant . . . . a weekly sum " not exceeding 10*s.* for the main- " tenance of [each child of the " marriage] until such child attains " the age of sixteen years."

By the Guardianship of Infants Acts, 1886 and 1925, provision is made for the making by the court of orders for the custody of infants and payment by the father to the mother of sums for their maintenance.

By the Guardianship of Infants Act, 1925, s. 7, sub-s. 1 : " For the " purposes of the Guardianship of " Infants Act, 1886, as amended " by this Act, the expression ' the " ' court ' shall include a court of " summary jurisdiction : Pro- " vided that a court of summary " jurisdiction shall not be compe- " tent . . . . (*c*) to award the pay- " ment of sums towards the main- " tenance of any infant exceeding " 20*s.* a week."

a week for each child. This alternative method of approach seems to have caused some trouble to the magistrates, not only in this case, but, I understand, in other cases.

A legal publication, whose columns are open to the solution, or attempted solution, of the problems of its readers, was, specifically asked [see Justice of the Peace, November 9, 1946 p. 547] : " Is there any reason why in a suitable case two " summonses should not be issued, the one claiming maintenance for the wife under the Summary Jurisdiction " (Separation and Maintenance) Acts, and the other claiming " maintenance for the children under the Guardianship of " Infants Acts ? " Far be it from me to belittle the wisdom of the anonymous expert who answered that question, but I will read without comment what he (or, possibly, she) said : " We cannot quote any authority against such a course, but " we feel that the Guardianship of Infants Acts should be used " to meet cases which do not fall within the Married Women " Acts, and that it is an evasion of the law to use both statutes " at one and the same time. Further, there is something in the " point that under the Guardianship of Infants Acts the wife " gets no maintenance for herself."

The magistrates, under the advice of their clerk, decided that they had no jurisdiction, and did not make any order with regard to the children, because the mother had already obtained some relief under the Married Women (Maintenance) Act, 1920, despite the fact that both the father and mother were represented before the magistrates, counsel or a solicitor representing the wife, and a solicitor representing the husband, who attended the court and agreed to the proposed order. The proposed order was to hand the custody of the two children, one aged nearly sixteen and another aged nearly thirteen, to the mother, and to allow her 1*l.* a week for each child, or at any rate for the younger child, as indeed was reasonable. The wife's evidence not being contradicted, and she not being cross-examined with regard to it, the evidence before the magistrates was that the husband was making approximately 20*l.* a week. He held a responsible position as secretary of a company and, having gone to live with some other woman, he evidently did not think it unreasonable, in the circumstances, that his wife should have her own 2*l.* a week and 1*l.* a week for each of the children. In spite of that, and in spite of the submission that there was no objection to the jurisdiction, the clerk to the justices has certified their reasons for rejecting the mother's application in these words: "Since the complainant already "had an order made in her favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, "it would be an evasion of the law to use both these statutes "and the Guardianship of Infants Acts at one and the same "time, and therefore the justices hold that they have no "jurisdiction to make a further order under the latter Acts." The clerk to the justices is, no doubt, a busy man. He cannot go into these matters with particularity. He was guided by the answer in this legal periodical to which I have referred, and he advised the justices in all good faith that the suggested evasion of the law is something which they must be careful to avoid. If one Act gives the mother the right to obtain 10*s.* a week for her infant child, and another Act says that she can obtain 1*l.* a week, I cannot see why she should not elect to apply under the latter Act.

I gather that the magistrates would have made this order, if they had not been troubled about the question of jurisdiction. As the father attended by his solicitor and raised no objection to what was proposed, it seems to me that the proper course for me to take is to say that the magistrates, under the guidance of their clerk or otherwise, took a wrong view. I cannot see the slightest reason for supposing that these Acts on the statute book are not available to be used by those who have occasion to use them. I think the proper course is to say that the appeal is allowed, to award the mother the custody of the younger child until she attains the age of sixteen years, and to make an order for the payment of 1*l.* per week in the case of the younger child. I have been informed that the older child (who will attain the age of sixteen years in April, 1947,) is now earning some money and that no order is sought in regard to her.

I am told that in the courts of summary jurisdiction in the metropolis it is a matter of routine or practice not to allow summonses under both Acts to proceed or be taken out. I can see no possible reason why women, who have been deserted by their husbands, should not be entitled to have the benefit of both these sets of statutes, and the rule or practice that they may not proceed under more than one of the two sets appears, in my judgment, as at present advised, to be misconceived.

Solicitor: *Peter Stainsby.*

J. L. D.

ROX-
BURGH
J.

1947

Jan. 21.

In re BALL. DECD.

HAND *v.* BALL AND OTHERS.

Will—Construction—Gift "to my son C. or his dependants"—"Dependant"—Meaning—Uncertainty—Validity.

A will contained a gift "to my son C. or his dependants "equally":—

Held, that there is not sufficient certainty about the word "dependants," when occurring in a will, to enable the court to give effect to a gift to "dependants": and that, therefore, as the gift to "dependants," in the case before the court, was substitutionary and incapable of taking effect, the gift to the son C. took effect as an absolute and indefeasible gift.

ADJOURNED SUMMONS.

By his will dated October 7, 1935, a testator, Charles Cornelius Jannaway Ball, provided, inter alia, "I give to my "wife all my furniture household effects for her own use "during widowhood or she dies and the freehold house "[naming it] so long as she lives in the same remains a widow "or dies, should she remarry or die. At her death or should "she remarry then the furniture and house goes to my son "Charles Ball or his dependants equally, not to my daughter-"in-law anything at all as it is now (date of signing) 2½ years "since she paid me a visit." On November 11, 1940, the testator died, on December 11, 1940, the son, Charles Ball, died intestate, and on April 3, 1945, the testator's widow died. At the date of this summons the house and furniture had been sold, the net proceeds of sale of the house being represented by the sum of 631*l*. 11*s*. 0*d*. and of the furniture by the sum of 70*l*. By this summons, taken out on June 3, 1946, by the sole executrix of the testator, the defendants to which were the three children and the widow of the son Charles Ball, the widow and one child being his administrators, the plaintiff asked, inter alia, whether the sums of 631*l*. 11*s*. 0*d*. and 70*l*. (*a*) became divisible on the testator's widow's death among the children of the son Charles Ball equally or some other and what class of person, or (*b*) formed part of the son Charles Ball's estate and was payable to his widow and to his child who was an administrator as administrators of his estate, or (*c*) was undisposed of by the testator's will.

L. R. Norris for the plaintiff.

Baden Fuller for the children of the son Charles. There appears to be no reported case in which the word "dependants" has been used in a will, but it is used in s. 4 of the Workmen's Compensation Act, 1925, and in s. 1, sub-s. 1, of the Inheritance (Family Provision) Act, 1938. True, to apply a statutory definition to a word contained in a will may be to use a two-edged weapon: for the mere existence of a statutory definition suggests, at the lowest, that the legislature considered that the word needed defining. On the other hand, if the meaning given by a statutory definition becomes sufficiently notorious, it may become the official every-day meaning of the word, besides being its statutory meaning. While it must be conceded that, putting these two statutory definitions at their highest, they are not of very great assistance in construing this particular will, they do make it clear that the meaning of the word " dependants " is not uncertain. It is not, therefore, necessarily uncertain when it is used in a will.

[ROXBURGH J. The definition in the Workmen's Compensation Act, 1925, is quite inapplicable for general purposes. What the court has to decide is whether the word " dependant " has of itself sufficient certainty to have a meaning in law.]

It may well be that the somewhat exhaustive list given by s. 4 of the Workmen's Compensation Act, 1925, is of no use for the present case. Some of the phraseology, however, is helpful: and on it may be based two definitions of the word " dependant "; first, " a person who to some extent depends " on others for the provision of the ordinary necessaries of " life "; secondly, " a person to some extent maintained by " another." The wife of the son Charles is excluded by the testator's will: and the only other persons who at all depended on the son Charles " for the provision of the ordinary " necessaries of life " were his three children. Therefore the word " dependants " in the testator's will must refer to them and, accordingly, the two sums in question became divisible among them equally on the testator's widow's death.

R. L. Stone for the widow of the son Charles. Even if the statutory definitions were accepted in the present case, it would not necessarily follow that the money was divisible between the son Charles' three children. Also, on the footing that a dependant is correctly defined as " a person to some " extent maintained by another " the son Charles would himself have been a " dependant " of his own children if ever they had put any of their wages into his hands. That is quite clear from a decision under the Workmen's Compensation Act, 1925. That definition, therefore, is not helpful. The only other definitions of "dependant" besides those in these two Acts, are in text-books on Income Tax. There are no definitions in the Finance Acts themselves. As no satisfactory definition exists, the gift contained in the words "or his dependants equally" is void for uncertainty.

It is a substitutionary gift and therefore the son Charles became entitled, on the testator's death, to an absolute gift in remainder: [he referred to *Salisbury* v. *Petty* (1)]. The two sums therefore form part of the son Charles' estate.

ROXBURGH J. stated the facts and continued: I now have to determine the destination of the proceeds of sale of the house and the furniture, having regard to the fact that the son survived the testator but predeceased the testator's widow.

It is surprising that the word "dependants" has, apparently, not been considered in any reported case on the construction of a will. It has been given statutory definition in the Workmen's Compensation Act, 1925, and in the Inheritance (Family Provision) Act, 1938. Those two definitions are, however, mutually exclusive and that in itself shows that I could not apply either of them as a suitable definition of the word "dependants" in a will. Mr. Baden Fuller, for the son Charles' three children, has suggested two possible definitions: first, "a person who to some extent depends on "others for the provision of the ordinary necessaries of life"; secondly, "a person to some extent maintained by another." If that is the best that can be done in the way of definition—and I have no reason to think that anything better can be done—there is not sufficient certainty about the word "dependants" in a will to enable the court to give effect to it. Therefore, as the gift to "dependants" in the present case is a substitutionary gift and is, in my judgment, incapable of taking effect, the gift to the son Charles Ball takes effect as an absolute and indefeasible gift, and I so hold.

Solicitors for all parties: *Lovell, Son & Pitfield, for Paris, Smith & Randall, Southampton.*

(1) (1843) 3 Hare 86, 90.

K. R. A. H.

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Dec. 3, 4, 5.

Morton, Somervell and Cohen L.JJ.

Landlord and tenant—Lease—Option for new lease—Option to purchase demised premises—Option for new lease not exercised within time specified—Claim by tenant to purchase demised premises—Memorandum of contract for sale of land—Rent book initialled by landlord—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40.

A father on December 18, 1936, granted to his son a lease for five years of premises which the son occupied as a residence and also for business purposes at a rent of 1*l.* a week. The lease contained in cl. 6 an option for the purchase by the son of the fee simple of the demised premises in the event of the father dying within the term thereby granted provided the son gave notice of his desire to purchase the demised premises within three months of his father's death. The lease expired on December 25, 1941. By cl. 7 of the lease the son had an option to take a new lease of the premises for a further term of five years at the same rent and with and subject to the same covenants and conditions as in the present lease were reserved and contained (the present covenant for renewal excepted), provided that the son gave notice of his desire not less than six months before the expiration of the term of the original lease. The son occupied the premises and paid the stipulated rent to his father each week, and the father initialled a rent book each week as an acknowledgment of the receipt of the rent. On July 6, 1941, the son was asked by his father what he intended to do about renewing the lease, and the son then wrote out and gave to his father a notice, dated July 7, 1941, of his desire to renew the lease for five years from December 25, 1941. No new lease was executed in pursuance of that agreement., But when the son went to pay his rent at the beginning of January, 1942, he took with him a new rent book and, at his father's request, he wrote as the heading of the new rent book : " Renewed Lease, December 25, " 1941," and the father week by week throughout that year initialled in the rent book an acknowledgment of the receipt of the rent. The father died on January 3, 1943, and his will was proved by the two plaintiffs as his personal representatives on January 29, 1943. On February 9, 1943, the son (defendant in this action) gave notice to the plaintiffs of his intention to exercise his option to purchase the demised premises contained in cl. 6 of the original lease. The plaintiffs then commenced proceedings claiming that there was no agreement binding on them to sell the premises to the son, who as a defence, set up the agreement of July 7, 1941, and also counterclaimed that the plaintiffs were bound to give him a new lease containing a like option to purchase the fee simple as that contained in cl. 6 of the lease of 1936. The plaintiffs in reply set up that there was no memorandum in writing of the agreement and that they would rely upon s. 40 of the Law of Property Act, 1925 :—

Held, by the Court of Appeal, assuming, without deciding the question, that the contract was one which came within s. 40 of the Law of Property Act, 1925, there was a sufficient memorandum of the agreement for the sale of land to satisfy s. 40 of the Act of 1925 in the rent book for 1942, the father's initials in which inserted by him week by week referred to and authenticated the words: "Renewed lease, December 25, 1941," as well as acknowledged the receipt of the rent. The rent book coupled with the notice of July 7, 1941, and the lease of December, 1936, contained all the terms of the contract; and the son was entitled to have a new lease granted to him by the plaintiffs which should contain a clause similar to cl. 6 of the original lease, giving the son the right to purchase the demised premises.

Decision of Vaisey J. affirmed in part and reversed in part.

APPEAL from Vaisey J.

The plaintiffs were the legal personal representatives of one, James Frederick Hill, who died on January 3, 1943, and was the father of the defendant, F. Hill.

In 1936, the father and the son were living on the outskirts of Birmingham. The son lived at No. 9, Nimmings Road, and was carrying on a business there as newsagent, stationer, tobacconist and fancy goods dealer. The father was living next door to him. On December 18, 1936, the original lease was executed. It was made between the father "hereinafter "called 'the landlord' which expression shall where the context "so admits include the persons deriving title under him, of the "one part, and the son hereinafter called 'the tenant' which "expression shall where the context so admits include the "persons deriving title under him," of the other part. There was a demise by the father to the son of "all that shop and "dwelling-house known as No. 9, Nimmings Road and now "in the occupation of the tenant." "To hold the same unto "the tenant from December 25, 1936, for the term of five years "paying therefor yearly during the said term the rent of 52*l.* "by equal weekly payments of 1*l.* payable every Monday, "the first of such payments (being a proportionate part of "such rent) to be made on January 4, 1937."

Clause 6 provided as follows: "(*a*) If on the death of the "landlord at any time during the term hereby granted the "tenant shall be desirous of purchasing the fee simple of the "demised premises and of such his desire shall within three "calendar months after the death of the landlord deliver to "the personal representatives of the landlord or leave for them "or send by registered post to them at the last known place "of abode of the landlord in England and Wales notice in

" writing then the personal representatives of the landlord will " upon the expiration of such notice and upon payment of the " sum of 900*l*. with interest thereon at the rate of five per " centum per annum from the expiration of the notice until the " actual completion of the purchase and of all rent hereby " reserved up to such expiration convey the demised premises " to the tenant or as he shall direct for an estate in fee simple " in possession . . . . (*b*) The landlord's title to the property " having been already investigated by the tenant up to the " date of the lease shall be deemed to be accepted by him up " to such date and he shall only be entitled to investigate the " subsequent title thereto an abstract whereof shall (if " required) be delivered to him within three months after the " service of the said notice. (*c*) The purchaser shall make all " requisitions in respect of the title within seven days after the " delivery of the abstract . . . . (*d*) The sale shall be made in " all other respects subject to the conditions of sale of the " Birmingham Law Society in force at the date of this lease."

Clause 7 provided as follows: " If the tenant shall be desirous " of taking a new lease of the demised premises after the " expiration of the term hereby granted and of such his desire " shall deliver to the landlord or leave for him or send by " registered post to him at his last known place of abode in " England or Wales notice in writing not less than six months " before the expiration of the said term then the landlord will " at or before the expiration of the term hereby granted if there " shall then be no subsisting breach of any of the tenant's " obligations under the present lease at the cost of the tenant " grant to the tenant a new lease of the premises hereby " demised for a further term of five years to commence from and " after the expiration of the term hereby granted at the same " rent and with and subject to the same covenants and " conditions as in the present lease reserved and contained " (this present covenant for renewal excepted)."

The defendant continued to live at No. 9, Nimmings Road until the lease expired. He paid his rent regularly and the rent was entered in rent books. The rent book for 1937 contained the names of the father and the son on the outside, which were, according to the evidence, written by the son. Inside in the son's writing was: " Under lease, dated " December 18, 1936." The name of the tenant was stated as " F. Hill." The rent was entered as 20*s*. per week, and on the right hand side of the centre page there was week by week

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entered the sum of 20s., and the initials "F. H." According to the evidence those initials were the initials of the father, and he wrote them in week by week on receiving the rent, although in fact the father's full initials were "J. F. H." Substantially similar entries appeared in the rent books for 1938, 1939, 1940 and 1941. In the rent book for 1938, the written heading was: "Lease December 18, 1936": In 1939: "Under lease, "18/12/36": In 1940: "Lease dated, December 18, 1936": In 1941 there was an obvious clerical mistake because the heading was: "Lease, dated December 12, 1936."

The findings of fact of Vaisey J. as to what happened when the lease was drawing near to its end were as follows: "The son "went into occupation of the property and there remained and "when June 25, 1941, came, which was six calendar months "before the expiration of the original lease, he had not served "any notice to extend the tenancy. There is no doubt that "as this document was dated after the coming into operation "of the Law of Property Act, 1925, 'month' means 'calendar "'month,' so that when the lease talks about 'six months' "it means six calendar months and not six lunar months. "June 25 having elapsed I find as a fact on the evidence that "on Sunday, July 6, the father, who lived next door to the "defendant, but who was, apparently, not on particularly good "terms with him, sent a message to the defendant and asked "him to come in and see him. The defendant went in and saw "his father and there was some conversation which perhaps "not surprisingly, after five years, was not very clearly "described to me, in the course of which the father said: "'What about your lease. I wish you would let me know "'what you want, because I would like you to renew it.' "Thereupon the defendant said: 'Oh, all right, I will see to "'it to-morrow.' The father said: 'There is no time like "'the present.' The defendant then went back to his own "house next door and he wrote out a document on a sort of "tear-off memorandum book, so that a carbon copy of it was "preserved. Taking this document there is, first of all, the "printed heading of the defendant's notepaper, he being a "newsagent, stationer, tobacconist and fancy goods dealer. "It then says: 'Mr. James Frederick Hill' that is the father, "to whom it was addressed 'July 7, 1941. Ref.'—that is "short for 'reference,' or 'referring to'—'the lease of shop "'premises, No. 9, Nimmings Road, Blackheath, dated "'December 25, 1936. This is the six months' notice required

" 'to renew the said lease for a further five years from " 'December 25, 1941, to the December 25, 1946, as the " 'instructions on the present lease now held signed F. Hill '— " that is the defendant—' July 7, 1941.' The defendant whose " knowledge of the law on such matters seems to have been " as shadowy as that of most people in this country, had one " idea firmly fixed in his mind that if he dated the document " on Sunday, it would have no operation, so that he dated it " the 7th which was the Monday following. The son having " brought the original memorandum to his father and retaining " in his house a carbon copy, first read it out and then handed " it to his father, and then after some more casual conversation, " he and his brother, who was present and who was called as a " witness at the trial, went back. No one else was there " except the defendant and his brother and the father."

The renewal notice was found in the father's pocket when he died on January 3, 1943. The defendant in his evidence in the examination-in-chief after giving an account of the interview on July 6, which is substantially that accepted by the judge added this: " It was made out on the Sunday and he "—that is the father—" accepted it, thanked me for it and put it away, " and I left it quite cheerfully." Then the judge asked: " You took it back to your father. What did he say about it " or what did he do? " and the answer was: " When I took " it back to him I read it out to him, and he folded it up " and put it away in his pocket." The brother Alfred, who was present said: " He then read the notice out to my dad " and he handed it to him. My father read it, and then passed " the remark: ' Well, that is quite satisfactory now. I am " ' quite satisfied. That will be all right now '."

No new lease was ever executed in pursuance of that agreement. In January, 1942, the father and son had a new rent book, which was the same form of rent book as before, " Chirm's " Tenants' Rent Book, 1942." As before, the son wrote on the outside his own name and address as tenant, and his father's name and address as landlord, but the ink heading written in by the son this year was: " Renewed lease, December 25, " 1941," and the father throughout that year, with the exception of one week, when someone else initialled the rent payment, continued to put his initials on that document. There was also evidence upon the question whether the words " Renewed lease, December 25, 1941," were on the document at the time when the father was putting his initials week by week. The son gave evidence, which the judge accepted, as follows. Referring to the beginning of 1942, he said: " I took " him rent in as usual on Monday morning and we were talking " and he definitely called my attention to the fact that this was " when the new lease began to operate, and would I mark it " under the new lease." Counsel for the defendant then asked : " These initials, ' F. H. ' were they put in there after you had " written the various things on the outside and in the body of " the book," and the answer was " Yes."

The father having died at the beginning of 1943, the son continued in occupation paying the rent. The will was proved by the two plaintiffs on January 29, 1943. On February 9, 1943, the defendant gave notice exercising the option to purchase contained in cl. 6 of the lease. It was common ground that if the defendant was entitled to that option to purchase it was a valid notice. On March 29, 1943, the defendant registered an estate contract with His Majesty's Land Registry.

The plaintiffs thereupon brought an action against the defendant, and by their statement of claim they claimed that there was no agreement binding on them as executors of the father to sell the premises in question to the defendant and that the registration of the estate contract should be vacated. The son in his defence set up the agreement of July 7, 1941, and counterclaimed for a declaration that the plaintiffs as executors of the father were bound to grant the defendant a new lease containing a like option to purchase the fee simple as that contained in cl. 6 of the lease of 1936. In their reply and defence to counterclaim the plaintiffs took the point that there was no memorandum in writing and that they would rely on s. 40 of the Law of Property Act, 1925 (1). Vaisey J. held that the father and the son entered into an effective and enforceable agreement that the son should have a new lease of No. 9, Nimmings Road, on the expiry on December 25, 1941, of the lease granted by the father to the son on December 18, 1936 and that that agreement was not of such a character as to come within s. 40 of the Law of Property Act, 1925, so that no memorandum in writing was required. But he also held that

(1) Law of Property Act, 1925, s. 40, sub-s. 1 : " No action may " be brought upon any contract " for the sale or other disposition " of land or any interest in land, " unless the agreement upon which " such action is brought, or some " memorandum or note thereof, is " in writing, and signed by the " party to be charged or by some " other person thereunto by him " lawfully authorized.'

the option to purchase the house which was contained in the original lease did not form one of the terms of the new lease to be granted to the son.

The defendant appealed and there was a cross-appeal by the plaintiffs.

Christie K.C. and *H. A. Rose* for the defendant.

Montgomery White K.C. and *E. M. Winterbotham* for the plaintiffs.

MORTON L.J. The first question which arises on this appeal and cross-appeal is: Did the father and son enter into an effective and enforceable agreement that the son should have a new lease of the house, No. 9, Nimmings Road, which he held as tenant of his father, on the expiry on December 25, 1941, of a lease granted by the father to the son on December 18, 1936? That first question can be divided into three sub-headings: (*a*) What was the contract between the father and the son? (*b*) Was it a contract which fell within s. 40 of the Law of Property Act, 1925? and (*c*) If so is there a memorandum in writing of that contract signed by the party to be charged within the meaning of that section. The second question, which is quite separate, is: Assuming that the son succeeds on the issues which I have mentioned, did an option to purchase the house, which was contained in the original lease, form one of the terms of the new lease to be granted to the son? Vaisey J. decided in favour of the defendant, that there was an agreement to grant such a new lease as I have described. He also decided that that agreement was not of such a character as to come within s. 40 of the Law of Property Act, 1925, so that no memorandum in writing was required. He, therefore, decided the first main question in favour of the son, and held that the son was entitled to have a new lease which would begin as from December 25, 1941. He, however, decided the second point against the son and was of opinion that the option to purchase contained in the original lease would not be reproduced in the new lease. The result was that his decision in favour of the son on the first question was of little use to the son, because the really vital thing from the son's point of view was that he should have an option to purchase the house. In these circumstances the son appeals, and there is a cross-appeal by the plaintiffs (the executors of the father) who seek to say that any agreement that was made between the father and the son required a

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memorandum in writing under s. 40 of the Act of 1925, and that there is no such memorandum in existence. [The Lord Justice stated the facts and continued :] I observe first, that what is contemplated by cl. 7 of the original lease is that in the event mentioned the tenant shall have a new lease and not merely a continuation of his present tenancy. Secondly, the reference to the "term" is to the term granted by the lease of December 18, 1936, and when the clause refers to "this present "lease," I think there is no doubt that the draftsman is referring to the document of December 18, 1936, and not to the term granted thereby. Finally, and this is to my mind a very important point, it is to be noted that there is an express exception of cl. 7 of the lease. Apart from that express exception, the new lease is to be "at the same rent and with "and subject to the same covenants and conditions as in the "present lease"—that is the document of December 18, 1936—"reserved and contained." [The Lord Justice stated the evidence with reference to the grant of the new lease and continued :] In my view the effect of the conversation on July 6, 1941, between the father and his son, the present defendant, coupled with the terms of the notice, is that the father agreed to grant and the son agreed to take a new lease "as per the instructions on the present lease now held." The instructions, as I understand the word, are that the new lease shall be, quoting cl. 7 of the original lease, "for a further "term of five years . . . . at the same rent and subject to the "same covenants and conditions as in this present lease "reserved and contained (this present covenant for renewal "excepted)." I think that the father and son must both have realized that the date for giving notice under cl. 7 had passed, because the notice itself is dated July 7 and refers to a six months' notice, and also refers to the date December 25, 1941. In the evidence it was stated that the father seemed worried because the renewal notice had not been given, but I do not suppose that either of them cared in the least whether the time had expired or not. I think that what I have just stated was also the judge's view of the matter at the trial, because he said in his judgment : "I do not know—it may be a very "difficult and a subtle point—but it seems to me as a matter "of common sense that if the arrangement between the father "and the son was that the son should at any time before "June 25, 1941, serve a valid notice on the father and there-"upon become entitled to a further lease, it is almost ridiculous

" that the father and the son could not be competent to come " together and say: 'Take the notice; never mind whether it " 'is a day or so late; I ask for it; you give it and I accept it.' " It seems to me, I must confess, idle to say that the father and " the son, the testator and the defendant, were not to be " competent, whether you call it waiver, whether you call it " revision, whether you call it concession, or whatever you like " to call it, to say: 'This notice is a day or two out of date, " 'I know, but you give it. I will accept it and we will not " 'trouble any more about it.' I think that there was an " agreement binding on the plaintiffs to grant the reversionary " lease, in other words, that the defendant has the right to be " tenant under a new lease following the terms of the old lease " from December 25, 1941 to December 25, 1946." No new lease was ever executed in pursuance of that agreement, but owing to equitable principles that does not affect the son's position if the agreement was made.

I shall now consider each of the questions which arise in this appeal in turn. The first question is: What was the contract between the father and the son? I have already stated what the contract was in my view, and I shall not repeat it. Secondly, was the contract one which fell within s. 40 of the Law of Property Act, 1925. It was contended on behalf of the plaintiffs that this contract was a new contract, entered into after the option to take up a new lease had expired, and that it was, therefore, a contract for the disposition of land or an interest in land. Vaisey J. thought that the contract did not come within s. 40, and before counsel for the plaintiffs commenced his admirable argument I was inclined to think that the judge was right in this. I now incline strongly to the view that the agreement does come within s. 40, and that the observations of Astbury J. in *Morrell* v. *Studd & Millington* (1) may at some time require further consideration, although the actual decision in the case may well be correct on the first ground stated by Astbury J. I refer in particular to the following sentence: " Now s. 4 of the Statute of Frauds only requires " a note or memorandum of the agreement referred to in the " section, which agreement does not come into existence until " the offer and acceptance are complete, and therefore an " agreement to extend the time for acceptance, or an agreement " that an acceptance, which by reason of its date need not be " treated as an acceptance, shall be so treated so as to create a

(1) [1913] 2 Ch. 648, 659.

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" contract, is not an agreement which the statute requires to " be evidenced in writing if the note or memorandum contained " in the signed offer is otherwise sufficient." As at present advised I have some difficulty in reconciling the words beginning " and therefore," with the subsequent comment by the learned judge on the same page on *Goss* v. *Lord Nugent* (1), and other similar cases. He says : " They merely decide that " when a contract falling within the Statute of Frauds is once " made, no conduct or verbal waiver can be relied upon to " substitute a different term from one appearing in the contract " itself." However it is not necessary to express a concluded view on the question, and indeed it would not be right to do so, as we have not heard counsel for the defendant in reply on that point. He might have satisfied us that no memorandum was necessary, and that the observations of Astbury J. which I have quoted can be supported. As we were all of opinion that there is in this case a memorandum sufficient to satisfy s. 40, we were prepared to assume in favour of the plaintiffs that such a memorandum is necessary.

The third question is : Assuming that a memorandum is necessary—and we are making that assumption—is such a memorandum produced ? It is, of course, well established that the signature required by the section may consist only of the initials of the party to be charged. It does not signify in what part of the instrument the signature is to be found, if it is inserted in such a manner as would have the effect of authenticating the relevant parts of the instrument. In the present case, in my view, the initials inserted by the father week by week in the rent book of 1942 do refer to and authenticate the words : " Renewed lease December 25, 1941," as well as acknowledging the receipt of the rent. What is the meaning of the words : " Renewed lease December 25, 1941 ? " I think the effect is that this document, initialled by the father, recognizes that his son is the tenant, paying 20*s.* a week, or 52*l.* a year, under a document or documents described as " renewed lease." I say a document or documents, because if there is a lease which has been renewed the renewal would ordinarily be done by some document such as a notice. As to the date, December 25, 1941, that, I think, would prima facie appear to be the date of the " renewed lease," but it might be the commencing date of the new tenancy. As there is a reference to a document or documents that document or those

(1) (1833) 5 B. & Ad. 58.

documents can be identified by parol evidence. That is established by the decision of this court in *Long* v. *Millar* (1) where Baggallay L.J. said: "The true principle is that there "must exist a writing to which the document signed by the "party to be charged can refer, but that this writing may be "identified by verbal evidence." Thesiger L.J. said (2): "When it is proposed to prove the existence of a contract by "several documents, it must appear upon the face of the "instrument signed by the party to be charged that reference "is made to another document; and this omission cannot be "supplied by verbal evidence. If, however, it appears from the "instrument itself that another document is referred to, that "document may be identified by verbal evidence." A recent illustration of the application of that principle is to be found in *Stokes* v. *Whicher* (3).

To my mind the document referred to by the words "renewed "lease" is identified by the evidence, as being the notice of July 7, 1941, plus the lease of December 18, 1936, which is referred to expressly in that document. The two documents are linked together by the reference in the notice to the lease of 1936. Looking at the three documents—the rent book, the notice and the lease of 1936—the whole of the terms of the contract plainly appear. There is, as I have said, the signature by the father in the form of initials, and the date "December 25, "1941," is explained, when one looks at the documents referred to, as being the date of the commencement of the tenancy which is recognized by the father in the rent book. The description: "Renewed lease, December 25, 1941," is a loose one, but it fits nothing else than those two linked documents, which together constitute, in rather loose parlance, a renewed lease, being a lease with its renewal notice. Notwithstanding the very ingenious arguments addressed to us by counsel for the plaintiffs on this branch of the case, I do not think that there is, as they suggest, a gap as to the terms of the contract which has to be supplied by oral evidence. For these reasons, in my view, the son is a tenant under the new lease, which has not been executed, but which he is entitled to have executed. The result is that on this part of the case I agree with the decision of the judge, though I have arrived at the same conclusion by a somewhat different route.

I must now deal with the counterclaim of the defendant, which was dismissed by Vaisey J., and consider whether the new lease, to which the son is entitled, should contain a reproduction of cl. 6 of the lease of 1936 conferring the option to purchase. The issue may be stated thus : Does cl. 7, conferring the option to extend the lease, contemplate a mere extension or a new lease corresponding in its terms to the lease of 1936, with one exception ? The judge obviously felt considerable doubt on the matter. After referring to *Sherwood* v. *Tucker* (1) and *Batchelor* v. *Murphy* (2) he pointed out that there had been a conflict of judicial opinion in those cases, and said : " I hold " that the option to purchase was not one of those terms which " would have been included in the new lease had it been " granted in pursuance of the executory contract which I have " already decided came into existence." I have arrived at a different conclusion. Looking at cl. 7, apart from any authority it starts with the words : " If the tenant shall be " desirous of taking a new lease of the demised premises "— not of extending the term, but " of taking a new lease "— after " the expiration of the term hereby granted " that is, the term granted by the lease of 1936. Then there is the reference to the six months' notice, and the clause proceeds : " Will . . . " grant to the tenant a new lease "—again the same phrase— " of the premises hereby demised." Then the term is stated, and it concludes: " at the same rent and with and subject to " the same covenants and conditions as in this present lease " reserved and contained (this present covenant for renewal " excepted)." I attach great important to two features of that clause—(1.) the words, " a new lease," and (2.) the exception contained at the end of it. Clauses 6 and 7 are alike in that they are not part of the ordinary terms of a tenancy. They give a collateral advantage to the tenant, and it seems to me clear that cl. 6 is intended to be included in the new lease when cl. 7, but not cl. 6, is expressly excepted.

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(1) (1879) 4 C. P. D. 450, 455.
(2) Ibid. 456.
(3) [1920] 1 Ch. 411.

I shall refer briefly to the two cases cited by the learned judge in his judgment. *Sherwood* v. *Tucker* (1) was, in my view, a very different case from the present. What happened there was that by a tenancy agreement in writing, dated October 29, 1914, and made between the defendant landlord, of the one part, and the plaintiff tenant, of the other part, the landlord agreed to let and the tenant to take a certain house and premises for a term of three years from December 25, 1914, at 36*l*. per annum rent. The tenant agreed to pay the rent and keep the interior in repair, fair wear and tear excepted. The landlord agreed to keep the exterior in repair. It was further agreed that " the said tenant shall have the right to " purchase the said house and premises during the three years " hereby provided for, for the sum of 700*l*. sterling." On June 17, 1917, during the pendency of this tenancy agreement the parties added and signed the following endorsement : " We the undersigned hereby agree that this lease be extended " for three years expiring December 25, 1920." There was a further extension in December, 1920, the endorsement being : " We the undersigned hereby agree that this lease be extended " for three years expiring December 25, 1923." These endorsements were settled informally by the parties. Astbury J. held on the construction of the documents, that the parties intended to extend the lease or tenancy agreement with all its provisions, collateral or otherwise, and that the option was extended accordingly. The Court of Appeal took a different view, and I think that view was based on reasons which I can quote from a short passage in the judgment of Sargant L.J. who said (1) : " Turning to this document, the phrase is ' this lease be " ' extended for three years.' What does that mean ? Does it " mean that the term is to be extended or that the contract is " to be extended with all its incidents ? I think the word " ' extension ' is not really strictly applicable, properly used, " with regard to the document. You cannot extend the " document. You cannot extend the actual lease. It is a " word properly applicable to the extension of the term " of years granted by the lease, though I incline to think that " a very slight alteration of the terms here might have pro" duced a different result. If the parties had agreed that the " house should be taken for a further term of three years upon " all the terms upon which it was taken under this contract the " result might very likely have been different." To my mind the present case is just the sort of case that Sargant L.J. is contemplating when he uses these words. He proceeds : " But on the whole I cannot find in this document anything " more than an extension, and an extension is prima facie " applicable to the term granted, and does not necessarily " involve the further grant of an option of purchase which is " not itself one of the incidents of a tenancy strictly speaking."

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(1) [1924] 2 Ch. 440. (2) [1925] Ch. 220.

Batchelor v. *Murphy* (2) was a case in which the

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(1) [1924] 2 Ch. 449.

(2) [1925] Ch. 220.

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relevant words were: "The said Alfred Henry Murphy and "C. L. Murphy to execute a new lease for the unexpired term "of eight years and six months from October 6 last"—that was the unexpired term of an existing lease—"on the "same terms and conditions in all respects as the lease of "October 17, 1913, with the exception of the rent." Then there was a proviso for reduction of the rent. Tomlin J. held on the construction of the memorandum that it only provided for a new lease containing the same tenancy provisions as the original lease; and that, as an option to purchase in a lease was not a term of the tenancy but a collateral bargain between the parties, the defendants had not acquired an option to purchase the freehold. Pollock M.R. agreed with the view of Tomlin J., but the other two members of the court, Warrington and Sargant L.JJ. differed from Tomlin J. and the appeal was allowed. In the course of this judgment Sargant L.J. referred to his own observations in *Sherwood* v. *Tucker* (1) which I have already read and he then said (2): "In my judgment that is "really precisely what has taken place, in the case which we "are now deciding. The parties agree to take a new document "the contents of which can be ascertained and determined by "reference to the existing document—namely, the lease of "October 17, 1913. In that view of the matter, it appears to "me that we must come to the conclusion, or I have to come "to the conclusion, that the option passes, because there can "be no doubt that the portion of the existing document which "created the option formed a part of the terms and conditions "broadly speaking of the existing document." The case went to the House of Lords (3) and the House affirmed the decision of the Court of Appeal without calling upon counsel for the respondent. I need only refer to one short passage in the speech of Lord Atkinson, where he said (4): "In my "opinion when the parties used the words that the new lease "is to contain all the terms and conditions in all respects as the "lease of October 17, 1913, which of course means contained in "the lease of October 17, 1913, they could use no words that "are more expressive to convey the idea that the new lease is "to be a replica of the old lease save and except in the two "points of duration of the time and rent." I think that those words are directly applicable to the present case, the exception being that cl. 7 is not to be included in the new lease.

(1) [1924] 2 Ch. 449.
(2) [1925] Ch. 233.
(3) [1926] A. C. 63.
(4) Ibid. 69.

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Counsel for the plaintiffs drew attention to certain difficulties which might arise if cl. 6 were incorporated in the new lease. He pointed out, quite accurately, that if the words: "if on "the death of the landlord at any time during the term hereby "granted," were incorporated in the new lease they would refer to the term of the new lease, and that the words could have no effect at all if the father had happened to die before the new lease came into effect. That is true, but the only result is that in that event the option would be valueless. He also drew attention to the fact that under (*b*) the landlord's title had not been examined by the tenant up to the date of the new lease and, therefore, the words would not accurately fit the facts, and that under (*d*) it was difficult to apply the reference to "the conditions of sale of the Birmingham Law Society in force "at the date of this lease," to a lease which was granted some five years later. These points are certainly points which would have to be carefully considered by the draftsman in drafting the new lease, but I personally feel no doubt that on the true construction of cl. 7 of the lease of 1936 the parties intended cl. 6 to be inserted in the new lease which the son chose to take, and they intended that the clause in the new lease should begin with the words: "If on the death of the landlord at any "time during the term hereby granted." How the draftsman would have resolved the minor difficulties to which counsel called attention, I need not pause to consider, but I think an observation made by Warrington L.J. in the course of the argument in *Batchelor* v. *Murphy* (1) applies very aptly to the present case. He said "If a solicitor had been instructed to "prepare the new lease would he have been justified in "omitting the option." In my view he would not. For these reasons I think that the cross-appeal of the plaintiffs must be dismissed and that the appeal of the defendant succeeds.

Somervell L.J. I agree with the judgment which has been delivered and the reasons for the conclusions arrived at which have been expressed in it by Morton L.J. On the question whether the agreement between father and son was within s. 40 of the Law of Property Act, 1925, and on the question of the counterclaim, that is to say, whether the option to purchase is to be treated as included in the lease, I do not desire to add anything to what has been already said. I wish, however, to add a few observations on the question of the note or memoran-

(1) [1925] Ch. 224.

dum, particularly in view of the fact that the learned judge, although he did not think a memorandum was necessary on the view which he took, expressed in the course of his judgment a view adverse to the conclusion to which we have come, namely, that the rent book can be regarded as a memorandum, not of course complete, but as a memorandum which may be made the basis of an answer to the defence under s. 40. Taking the words " Renewed lease " as they appear in the rent book of 1942 with the father's initials, in my view those words denote either a new lease or an agreement to grant a new lease and I think they are capable of meaning either.

My Lord has already cited the principle as laid down by Baggallay L.J. in *Long* v. *Millar* (1), and I will not repeat it. The evidence shows that the son expressed his willingness to renew the lease, and embodied that in the document of July 7, 1941. I think there are two ways in which this document can be looked at, but, treating it as a notice (although out of time) under the lease of December 18, 1936, the rent book signed by the father seems to me to show a liability or willingness to grant a new lease. As the document of July 7, 1941—and there was no dispute about this—refers to the lease of 1936, and as that document sets out the terms on which the renewed lease was to be granted, the memorandum of agreement required by the section seems to me to be complete.

Another way in which it could be looked at occurred to me in the course of the argument, particularly in the light of the argument of counsel for the plaintiffs that once the date six months before the end of the first lease had been passed the whole machinery of notice under that document was dead. Under that document the son had a right to have the lease renewed if he gave the notice as provided for in it before the stipulated period expired. He had allowed that time to pass and counsel submitted that that machinery was, as it were, dead and nothing could revive it except something in writing, signed by the parties and directed to the particular point of the extension of time. On that basis, I again start from my view that the rent book is evidence of an agreement between the parties for a new lease. That agreement must have resulted from an offer and acceptance. The evidence—and on the authorities one is entitled to have regard to this evidence—shows that the offer was made by the son at the request of the father and was embodied in the document of July 7, 1941.

(1) 4 C. P. D. 450, 455.

On this view the son is not exercising a right out of time under the original lease, but the agreement evidenced by the notice is to be treated as an offer by the son accepted by the father. On this view the form of the document of July 7 is admittedly misconceived in that the son is wrong in thinking that he could put forward a notice under the original lease, but I think on this view this document can and should be treated as an offer by the son to take a renewal of the lease which was accepted orally by the father, the rent book of 1942 and the father's initials in it being a memorandum of the agreement which resulted from that offer and acceptance. Those are the reasons which lead me to the conclusion that there was here a sufficient memorandum and, as I have already said, I do not desire to go into the other points.

COHEN L.J. I agree with the conclusions reached by my brethren and the reasons on which they base those conclusions, I confess that my mind fluctuated during the course of the hearing, but I have come to the conclusion that the father was bound to renew the lease of the premises on the terms specified in cl. 7 of the lease of December 18, 1936; that on the true construction of cl. 7, the renewed lease must include the option to purchase conferred by cl. 6; and that if a memorandum in writing of the agreement to grant the new lease was necessary, that memorandum is to be found in the documents indicated by Morton L.J.

I only desire to add that on its natural construction the word "lease" in cl. 7 refers to a document and not merely to a relation of landlord and tenant, and that, in view of the words in brackets at the end of the clause, there is no justification for omitting cl. 6 from the renewed lease, notwithstanding that it is a collateral term and would not bind assignees of the reversion. I do not think we should be justified in departing from the natural meaning of the words used merely because the insertion of the clause in the new lease might not have helped the son if for instance, the reversion had been assigned before the option to purchase was exercised.

I arrive at this conclusion without regard to the circumstances, but if and so far as it is permissible to look at them, they seem to me to support the conclusion we have reached. This was a lease by a father to his son of premises which to the father's knowledge, were both the residence and the place of business of the son. The father desired to give his son the

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certainty of being able, if the father died, to retain the premises, and it seems to me highly unlikely that he would have wished the son to have this opportunity if the father died during the original term and not to have it if he died during the extended term

Appeal allowed.
Cross-appeal dismissed.

Solicitors for plaintiffs: *Stafford Clark & Co., for C. Green, Birmingham.*

Solicitors for defendant: *Dennison, Horne & Co., for B. H. Bate & Son, Birmingham.*

R. F. S.

VAISEY J.
1947
Jan. 17, 29.

In re DICKER. CRALLAN *v.* TOMLINSON.

Will—Construction—Bequest to illegitimate child described as " nephew " —Residue given to children or child of a sister—Nephew sister's only child—Cannot claim to share as " child."

The testatrix by her will, after giving a number of pecuniary legacies, including a legacy to my " nephew J.," directed her trustees, after the death of her sister, Mrs. T., to hold one equal fourth share of her residuary estate upon trust to divide the capital and income thereof " equally between the children of Mrs. T. " living at her death if more than one and if only one to that child " absolutely." Mrs. T., who was seventy-seven years of age at the date of the will, predeceased the testatrix, having had one child only, namely, the nephew J. referred to in the will, who was illegitimate. J. claimed as the only child of Mrs. T. to be entitled to a one-fourth share of the residue:—

Held, that the mere description of J. as the nephew of the testatrix in one clause of her will did not entitle him to claim to be a child of her sister in another clause of the will. There was no controlling context or rebutting circumstance which showed that the testatrix in the gift to the " children " of her sister intended to include illegitimate children. Accordingly, an illegitimate child could not claim as an only child: *In re Hall* (1887) 35 Ch. D., 551, followed.

ADJOURNED SUMMONS.

Henrietta Sophia Dicker, by her will, dated April 20, 1940, made a number of pecuniary bequests, including one in the following terms: " to my nephew John Edward Tomlinson " the sum of 300*l*." By cl. 6 she directed her trustees to hold

[Report by Miss B. A. BICKNELL, Barrister-at-Law.]

her residuary estate upon trust to pay the annual income thereof to her sister, Mrs. Beatrice Harriet Tomlinson, during her life and after her death to divide the same into four equal shares and to hold one of such shares " upon trust to divide the capital " and income thereof equally between the children of the said " Mrs. Beatrice Harriet Tomlinson living at her death if more " than one and if only one to that child absolutely."

The testatrix was over eighty years of age when she died on April 28, 1943. Mrs. Beatrice Harriet Tomlinson, who predeceased the testatrix, was seventy-seven years of age at the date of the will. She had had only one child, the defendant, John Edward Tomlinson, the nephew named in the will. He was born before her marriage and was not thereby legitimated.

This summons was taken out by the executors of the will asking whether John Edward Tomlinson had become absolutely entitled to the one-fourth share of the residuary estate of the testatrix directed to be held on trusts for the children or child of Mrs. Tomlinson.

H. A. Rose for the plaintiffs.

Belsham for the first defendant, John Edward Tomlinson. Where a person is referred to in one part of the will as " my " nephew " prima facie he is entitled to share as a " child " under a gift in another part of the will. The modern tendency is to distinguish the case of *In re Hall* (1). The evidence must be looked at. It is immaterial here whether the testatrix knew that her sister's child was illegitimate or not. The sister had only one child and the testatrix knew she could have no more. He referred to Theobald on Wills, 9th ed., p. 256, and to Jarman on Wills, 7th ed., p. 174.

D. H. McMullen (*Danckwerts* with him) for the second defendant, the personal representatives of one of the next of kin of the testatrix. There is nothing in this will to exclude the established rule that " children " means legitimate children. The decision in *In re Hall* (1) is still an authority and should be followed where it applies, as it does here. He referred to *Dorin* v. *Dorin* (2) and *Hill* v. *Crook* (3).

Jopling for the other defendants, next of kin. The fact that the testatrix described the first defendant as her nephew does not show that she was using the word " child " elsewhere in the will otherwise than in its ordinary sense of legitimate child. He referred to *In re Pearce* (1).

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(1) (1887) 35 Ch. D. 551.

(2) (1875) L. R. 7 H. L. 568.

(3) (1873) L. R. 6 H. L. 265.

Cur. adv. vult.

Jan. 29. VAISEY J. read a judgment, in which he stated the facts, and continued : The evidence which has been filed as to what the testatrix knew of the facts which I have mentioned seems to me to come to nothing at all, so that I need not consider the question of its admissibility. It goes no further than this—that she knew that John Edward Tomlinson's status as a legitimate child of Mrs. Tomlinson "was open to doubt," and that in conversation she would refer to him as "Beatrice's "child" or as "my nephew." I am not told that she knew, or even believed, that he was Mrs. Tomlinson's only child, and I should have had the greatest difficulty in crediting her with any such knowledge or belief in the face of the reference in her will to her sister's children or child. That reference plainly implies that she thought, when she made her will, that there were or might be two or more children of Mrs. Tomlinson then in existence, for I dismiss as absurd the suggestion that this old lady of over eighty can possibly have had in her mind the idea that her sister of over seventy-seven might thereafter have another child, nor in my judgment am I thereby offending against any principle laid down in *In re Deloitte* (2) or in the last case in the House of Lords, *Berry* v. *Geen* (3).

Now it is well settled that the mere description of John Edward Tomlinson as the nephew of the testatrix in one clause of her will would not of itself entitle him to count as a child of her sister under another clause ; see *In re Hall* (4). This is because the word "child" in the absence of a clear controlling context or plainly rebutting circumstance means legitimate child ; see *Hill* v. *Crook* (5), *Dorin* v. *Dorin* (6) and *In re Pearce* (1). No such context and no such circumstance is to be found here. The testatrix in the relevant clause of her will expresses her intention to benefit either : (*a*) a class of children, or (*b*) an only child. I can see no possible ground for holding that she meant the class of children to include illegitimate children, and therefore, I fail to see how an illegitimate child can possibly come in as an only child. If the gift had been to Mrs. Tomlinson's "child" (without any mention of

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(1) [1914] 1 Ch. 254.
(2) [1926] Ch. 56.
(3) [1938] A. C. 575.
(4) (1887) 35 Ch. D. 551.
(5) (1873) L. R. 6 H. L. 265.
(6) (1875) L. R. 7 H. L. 568.

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"children") the case would have been different; see *In re Eve* (1).

I confess that I should like to have found some reason for deciding this matter in John Edward Tomlinson's favour, because I strongly suspect that the verbiage of the clause in question was introduced into it in conformity with the wording of the clauses relating to two of the other three fourth shares by the draftsman. The unnecessary allusion to children in the plural would usually have been innocuous. My suspicion may be wrong, and, in any case, I have to construe the will as it stands. If, as is probable, the testatrix was fully aware of all the facts and had intended John Edward Tomlinson to take the share if he survived his mother, she could so easily have said so in plain terms. I am bound to declare that the share in question is undisposed of by the will of the testatrix and devolves as under her partial intestacy.

Solicitors: *Bannister & Fâche; Church, Adams, Tatham & Co.; Ince & Co.*

(1) [1909] 1 Ch. 796.

In re C. W. DIXON, LIMITED.

VAISEY J.

1947

Jan. 19, 20.

Company—Dissolution—Land vests in Crown as bona vacantia—Order avoiding dissolution—Land revests in company—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 294 (1.), 295 (6).

When an order is made under s. 294 of the Companies Act, 1929 declaring the dissolution of a company to have been void the dissolution is avoided ab initio and all consequences which flowed from the dissolution are also avoided. Accordingly, any property, which on the dissolution is supposed to have been vested under s. 296 in the Crown as bona vacantia, either in fact never did so vest, or, in so far as it must be assumed to have so vested, such vesting is avoided by the order and no order expressly revesting such property in the company is required.

MOTION.

At an extraordinary general meeting of C. W. Dixon, Ld., held on June 12, 1941, a special resolution was duly passed for the voluntary winding up of the company and Leslie Forbes McCullock was appointed liquidator. He collected and

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

realized the assets of the company with the exception of its land and, after paying creditors and the costs of the liquidation, distributed the proceeds among the contributories. A substantial part of the assets of the company consisted of freehold and leasehold properties, the freeholds being vested in the company and the leaseholds being vested in the principal shareholder of the company as trustee for it. In 1943, an agreement was entered into between the liquidator and all the contributories, under which it was agreed to divide the freehold and leasehold properties in specie between the contributories in the manner specified in the agreement. From 1943 onwards the contributories had severally taken the rents and profits of the properties allotted to them respectively, but no conveyances or assignments vesting the properties in them were ever executed.

Under the provisions of s. 236, sub-s. 4 of the Companies Act, 1929, the company was deemed dissolved on January 28, 1945.

By this motion the liquidator and the contributories applied under s. 294, sub-s. 1 of the Companies Act, 1929 (1), for a declaration that the dissolution of the company was void.

Oliver Smith for the liquidator and contributories. It is uncertain whether an order under s. 294, sub-s. 1, declaring the dissolution of the company to have been void will revest in the company any property which has vested in the Crown under s. 296 as bona vacantia. An express vesting order revesting the land in the company would assist the company's title.

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(1) By the Companies Act, 1929, s. 294 (1.): "Where a "company has been dissolved, the "court may at any time within "two years of the date of the dissolution, on an application being "made for the purpose by the "liquidator of the company or "by any other person who appears "to the court to be interested, "make an order, upon such terms "as the court thinks fit, declaring "the dissolution to have been void, "and thereupon such proceedings "may be taken as might have "been taken if the company had "not been dissolved."

By s. 295 (6.): "If a company "or any member or creditor "thereof feels aggrieved by the "company having been struck off "the register, the court on an "application made by the "company or member or creditor ". . . . may, if satisfied that the "company was at the time of the "striking off carrying on business "or in operation, or otherwise "that it is just . . . . order the "name of the company be restored "to the register, and . . . . the "company shall be deemed to have "continued in existence as if its "name had not been struck off; "and the court may by the order "give such directions and make "such provisions as seem just for "placing the company and all "other persons in the same position as nearly as may be as if the "name of the company had not "been struck off."

Danckwerts for the Attorney-General. I know that in one case at least a vesting order has been made, but it is not the usual practice.

VAISEY J. The form of s. 294, sub-s. 1, is in somewhat striking contrast to s. 295, sub-s. 6, which envisages the case of the resuscitation of a company which has not been dissolved but has been struck off the register, and says that the court, on an application made by the appropriate person, " may, " if satisfied that the company was at the time of the striking " off carrying on business," and so forth, " order the name of " the company to be restored to the register, and upon an office " copy of the order being delivered to the registrar for regis" tration the company shall be deemed to have continued in " existence as if its name had not been struck off." The differences between those two sections were elaborately considered by the House of Lords in the case of *Morris* v. *Harris* (1). The headnote to that case is : " An order of the court made " under s. 223 of the Companies (Consolidation) Act, 1908 "— that is the section corresponding to s. 294 of the Act of 1929— " declaring the dissolution of a company to have been void " does not affect the validity of proceedings taken during the " interval between the dissolution and its avoidance." That was the conclusion reached by the majority of the House of Lords, consisting of Lords Dunedin, Sumner and Blanesburgh, Lords Shaw and Wrenbury dissenting.

The facts are very different, and perhaps the case itself is not a very good guide, but there is a passage in the speech of Lord Blanesburgh which seems to be of some assistance to me on this occasion. Lord Blanesburgh, after quoting the appropriate words from the section, says (2) : " It is true that a " declaratory order under the section unqualified in terms does, " and it was in my judgment essential, if many difficulties " which readily occur to the mind were to be avoided, that " such an order should have the effect of restoring to the " revived company its corporate existence as from the very " moment of the dissolution thereby declared ' to have been " ' void.' But the expository words which follow carefully

(1) [1927] A. C. 252.

(2) Ibid. 268, 269.

"and, as I think, advisedly refrain from adding that such an "order is to have the effect of restoring to the company from "the same moment, not its corporate existence only, but its "corporate activity also. On the contrary, these expository "words import, as I think, that it is only after the order has "been made—it is 'thereupon' but not before—that any "active consequences are to ensue." Then his Lordship considered the effect of that on the facts of that particular case and used this rather illuminating metaphor: "The "company is restored to life as from the moment of dissolution but, continuing a convenient metaphor, it remains "buried, unconscious, asleep and powerless until the order "is made which declares the dissolution to have been void. "Then, and only then, is the company restored to activity."

The trouble which is contemplated as possibly arising in the present case is due to the terms of s. 296 of the Act of 1929, which says: "Where a company is dissolved, all property "and rights whatsoever vested in or held on trust for the "company immediately before its dissolution (including leasehold property but not including property held by the "company on trust for any other person) shall, subject and "without prejudice to any order which may at any time be "made by the court under the two last foregoing sections of "this Act"—those are s. 294, sub-s. 1 and s. 295, sub-s. 6— "be deemed to be bona vacantia and shall accordingly belong "to the Crown, or to the Duchy of Lancaster or to the Duke of "Cornwall for the time being, as the case may be . . . ." I am informed by Mr. Danckwerts that, to avoid any suggestion being made that the effect of an order under s. 294 is not sufficient to revest in the company for all purposes any property which came within the ambit of s. 296, a vesting order as to such property in favour of the restored, revived or resuscitated company has, at any rate, in one case, been made. But I understand the making of such a vesting order is by no means frequent, and, although it may have been done in one case ex abundanti cautela, I think it would not be right for me to make such an order as though it were the necessary or common thing to do. Therefore, I propose to indicate quite shortly what, in my view, is the effect of s. 294 on any property which, but for my order, might have been affected, or which, until my order takes effect, has been affected by s. 296. By the words of s. 294, sub-s. 1, the court has power to declare "the dissolution to have been void," and it is quite plain, in my judgment, that I must read those words as enacting that this court is given power effectively to declare the dissolution to have been void. Anyone can declare a dissolution to be void; it is a mere matter of utterance; but when the court is given power to declare that something has happened, I apprehend the legislature must inevitably intend to give the court power of making a declaration which is effective. In other words, if a declaration is made to that effect, the dissolution is void. It is to be observed that the declaration is not that the dissolution is void at the date of the order, or that it is to be deemed to be void, or that it is to become void, or anything of the kind, but the order which is contemplated is an order declaring " the " dissolution to have been void " ; that is to say, void at the time when the company was supposed,wrongly as we now know, to have been dissolved.

In my judgment, if I declare the dissolution of C. W. Dixon, Ld., on January 28, 1945, to have been void, the result will be that it was void ab initio, and all the consequences under the statute, or otherwise, which flow from that dissolution are themselves avoided. I propose, therefore, following the words of the section, to make an order declaring the dissolution to have been void. In doing so, I express the view that any property which is supposed to have been vested in the Crown under s. 296, either in fact never did so vest, or, in so far as it must be assumed to have vested, the vesting is avoided by my order. In fact, the vesting is " subject and without prejudice " to any order which may, at any time, be made by the court " —that is what s. 296 says—and I express the view that, by making the order in the terms which I do, nothing remains in the Crown, if anything was ever vested in the Crown, or in the Royal Duchies, in the shape of an interest in this freehold or leasehold property. The difference of expression between s. 294, sub-s. 1 and s. 295, sub-s. 6, is curious, and though for some purposes no doubt difference in language may be significant, it is not so for this purpose. In my view, the avoidance of dissolution has the effect which one would have expected, and I propose, therefore, to give the present petitioners no more than an order following the precise words of the relevant section.

Solicitors for the applicants: *Collyer-Bristow & Co., for Grange & Wintringham, Grimsby.*

Solicitor for the Attorney-General: *Treasury Solicitor.*

ROX-
BURGH
J.

1947

Feb. 12.

Considered. In re MELDRUM, DECD. [1952] 1 Ch. 208

In re JAMES. LLOYDS BANK LIMITED *v.* ATKINS.

Administration — Will — Specific devise and bequest of real and personal property—Trust for sale and investment after payment of debts—Bequest of residue to widow—Order of application of assets in payment of debts—Specific property charged in exoneration of residue —Statutory order varied by will—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3, *Sch. I., Part* 2, *paras.* (3.) (4.), (8.).

Specific real and personal property was given by the will of a testator to the executor on trust for sale, and after payment of debts, funeral and testamentary expenses to invest the proceeds and pay the income to the widow during her life and subject thereto to hold the same for a class of beneficiaries. The testator gave the residue of his estate including furniture, household and personal effects to his wife absolutely :—

Held that on the true construction of the will there was a direction to pay debts out of property specifically devised and bequeathed, and that the residue was exonerated from liability to pay debts. The statutory order of application was therefore varied by the will of the deceased.

In re Littlewood [1931] 1 Ch. 443 followed.
In re Gordon [1940] Ch. 769 distinguished.
In re Kempthorne [1930] 1 Ch. 268 discussed and explained.

ADJOURNED SUMMONS.

By his will, dated February 28, 1933, Walter James, who died on December 22, 1943, gave, devised and bequeathed to his executor and trustee, Lloyds Bank Ld., his house, No. 12, St. Thomas Square, Monmouth, and a parcel of land near Redbrook, together with any money standing to his credit at the bank " upon trust as and when the Bank shall think fit " to sell call in and convert into money the same or such part " as shall not consist of money and after payment of my just " debts funeral and testamentary expenses to invest the pro- " ceeds in trustee securities " ; and the testator directed the bank to stand possessed of the net rents, profits and income which should from time to time accrue from the said property and certain other property upon trust to pay the same to his wife, Emily James, during her life and after her death upon trust to pay the same in equal shares to or for the benefit of a large class of nephews and nieces. After making other dispositions, not material to be stated, the testator bequeathed all the residue of his estate, including his furniture and household and personal effects, to his wife absolutely. The summons raised the question whether upon the true construction of the will the proceeds of sale of No. 12, St. Thomas Square, and the land at Redbrook and the moneys to the credit of the testator at the bank, or the testator's residuary estate, was the primary fund for payment of the testator's funeral and testamentary expenses, including estate duty on his personal estate, and debts and administration expenses. Either fund was sufficient to bear the whole of the burden of the payments in question.

A. H. Droop for the plaintiff (executor).

Gwyn Rees for the first defendant Atkins, a nephew. It is submitted that the funeral and testamentary expenses and debts are payable out of the residuary estate and not out of the fund specified in the will. Under s. 34, sub-s. 3, and Part 2 of sch. I. of the Administration of Estates Act, 1925 (1) property included in a residuary gift is to be resorted to before property " specifically appropriated for the payment of debts."

Although the order of application may be varied by the will, words which create the specific appropriation cannot of themselves without some further indication be sufficient to vary the statutory order, because, if so, the direction to resort to residue

(1) Administration of Estates Act, 1925, s. 34, sub-s. 3: " Where " the estate of a deceased per- " son is solvent, his real and " personal estate shall, subject " to rules of court and the " provisions hereinafter contained " as to charges on property of the " deceased and to the provisions, " if any, contained in his will, " be applicable towards the dis- " charge of the funeral, testa- " mentary and administration " expenses, debts and liabilities " payable thereout in the order " mentioned in Part II of the " First Schedule to this Act." Schedule I, Part II: " Order of " application of assets where the " estate is solvent. (1.) Property " of the deceased undisposed of by " will, subject to the retention " thereout of a fund sufficient to " meet any pecuniary legacies. " (2.) Property of the deceased not " specifically devised or be- " queathed but included (either " by a specific or general descrip- " tion) in a residuary gift, subject " to the retention out of such " property of a fund sufficient to " meet any pecuniary legacies so " far as not provided for as afore- " said. (3.) Property of the " deceased specifically appro- " priated or devised or bequeathed " (either by a specific or general " description) for the payment of " debts. (4.) Property of the " deceased charged with or devised " or bequeathed (either by a " specific or general description) " subject to a charge for the " payment of debts. (8.) The " following provisions shall also " apply—(*a*) The order of appli- " cation may be varied by the will " of the deceased. (*b*) This part " of this schedule does not affect " the liability of land to answer " the death duty imposed thereon " in exoneration of other assets."

before the appropriated property could never apply. In the present case there is no indication other than the mere appropriation of the fund. The statutory order has not been varied by the will and the decision in *In re Gordon* (1) following *In re Kempthorne* (2) applies. [*In re Atkinson* (3) and *In re Littlewood* (4) were also referred to.]

Boraston for the widow was not called on.

ROXBURGH J. [after stating the facts and reading the relevant provisions of the Act :] Before I turn to the authorities I will express my view upon the construction of this will. As I have indicated, the testator gave and devised and bequeathed particular property upon trust to sell and, after payment of debts, funeral and testamentary expenses, to invest the proceeds. In my opinion when he directed the bank to sell and after payment of debts to invest, he was directing the bank to pay the debts; they could not effectively carry out his direction to invest after payment without paying them. Therefore, I should hold that the testator had specifically appropriated or devised or bequeathed property for the payment of debts, within the meaning of para. 3 of Part II of sch. I. to the Administration of Estates Act, 1925. Secondly, I should hold that the direction to pay debts out of a particular fund necessarily involved an intention to exonerate some other fund which the testator disposed of in some other part of his will—in other words, necessarily involved an intention to exonerate the residue of his estate which he devised and bequeathed to his wife absolutely.

Should I be right in reaching those conclusions ? This depends upon a difficult line of authorities. In *In re Kempthorne* (5), Maugham J. (as he then was) made these observations : " Now, in both of those cases "—and he was referring to paras. 3 and 4 of Part II of the schedule in question—" it is to be noticed that the legislature is assuming that the " testator by his will has specifically appropriated in one case, " or devised or bequeathed in the other, property for the pay- " ment of debts ; or that he has charged with payment of debts " specific property, or some property, under a general descrip- " tion, or devised or bequeathed property subject to a charge " for payment of debts, and I cannot help concluding that

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(1) [1940] Ch. 769.
(2) [1930] 1 Ch. 268.
(3) [1930] 1 Ch. 47.
(4) [1931] 1 Ch. 443.
(5) [1930] 1 Ch. 268, 278.

" those two paragraphs mean that the fact that the testator " has done one of those things is not per se to constitute, to use " the words of s. 34, sub-s. 3, a provision in the will which " operates to alter the order of application which is specified " in Part II of the schedule." Mr. Gwyn Rees has, very properly, referred to that passage, which, as I shall show in a moment, has since been applied in *In re Gordon* (1), and he has submitted that those words apply to the present case. But, in my judgment, they do not because in that passage the words "per se"' seem to me to be of vital importance, and in the present case there is to be found not only a devise or bequest of particular property for the payment of debts but also an intention to exonerate therefrom another category of property disposed of by will, namely residue ; and I think that a review of subsequent cases will show that this ground of distinction is valid.

In *In re Atkinson* (2) the testator bequeathed all his personal estate to his trustees upon trust for sale and conversion and upon trust that they should out of the moneys produced by such sale and conversion and of any ready money pay his funeral and testamentary expenses and debts and the legacies bequeathed by any codicil and should stand possessed of the residue of the moneys in trust as to one-third part thereof for one beneficiary, as to one other third part for another beneficiary, and as to the remaining one-third part for another beneficiary. The testator had also disposed of some real estate specifically and that disposition failed. The question was whether the primary fund was undisposed of realty or the residue of personalty. Clauson J. (as he then was) said this : " It has been contended on behalf of the residuary legatees " that, by force of the new Act "—that means the Act of 1925—" the debts were made primarily payable out of the " undisposed of real estate. On the other hand, it was con" tended on behalf of those who would take the undisposed of " property that, before the provisions of Part II can be applied, " regard must first be had to the provisions, if any, contained " in the will. The question then is whether there is to be found " in the will any provision which has the effect of altering the " statutory order of application and putting some other assets " of the deceased in front of the undisposed of real estate. " In *In re Lamb* (3) there was no such provision to be found in

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(1) [1940] Ch. 769.

(2) [1930] 1 Ch. 47.

(3) [1929] 1 Ch. 722.

"the will and in *In re Petty* (1) a mixed fund was created "for payment of debts, etc., and there was there no undisposed "of moiety of the balance of residue until the debts had been "paid. Here the will contains a clear direction to the trustees "to convert the personal estate and out of the moneys produced "by such conversion to pay his funeral and testamentary "expenses and debts: until that provision is worked out there "is no necessity to have recourse to Part II of the first schedule "to the Act."

In *In re Littlewood* (2), Maugham J. (as he then was) had to deal with the following will. Hannah Littlewood gave and bequeathed "all my farm stock, implements and tenant right, "but charged with the payment of all my just debts and funeral "and testamentary expenses, and also with the payment "thereout of the legacies mentioned in the will of my late "husband William Littlewood, and an additional legacy of 50*l*. "which I bequeath to my stepdaughter Eleanor Booth, unto "and equally between my stepson George Littlewood and my "son Fred Littlewood"; and the will contained also a gift of the testatrix's residuary estate to Frederick Littlewood absolutely. Maugham J. said this (2): "But if a testator chooses "to charge debts by his will on certain specific items of personal "estate, and then gives his residue to some person other than "the legatee of the specific property, there can be no doubt, "on the construction of his will, that he intends the specific "property to be primarily applied in payment of the debts, "to the exoneration of the person to whom the residue is given: "*In re Smith* (3). Accordingly, in my view, the testatrix in "this case intended to give to George Littlewood and Frederick "Littlewood her farm stock, implements and tenant right, after "payment thereout of all just debts and funeral and testamentary expenses and the legacies therein mentioned and "therein bequeathed: and to the residuary legatee Frederick "Littlewood she intended to give the whole of the rest of the "real estate, discharged from the payment of debts and "legacies, provided that the specific gift of farm stock, implements and tenant right was of sufficient value to discharge "the liabilities." It appears to me that the language there used by Maugham J. is appropriate to the present case. He then continues: "I have now to consider the effect of Part II of "sch. I to the Administration of Estates Act, 1925, having

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(1) [1929] 2 Ch. 726.

(2) [1931] Ch. 443, 445.

(3) [1913] 2 Ch. 216.

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"regard to the authorities and also to the provisions of s. 34, "sub-s. 3, of the Act and para. 8 of Part II of sch. I "which provides that 'the order of application may be varied "'by the will of the deceased.' In *In re Kempthorne* (1) "I endeavoured to explain the difficulty which I felt in giving "effect to some of the provisions of that part of that schedule." Now I have no doubt that those words are a reference to the passage which I read earlier in my judgment. Maugham J. continues: "and I understand that the Court of Appeal, who "differed from me on one point in that case, also felt some "difficulty in explaining the precise effect of those provisions. "I think, however, that I am justified in taking the view that, "prima facie, the paragraphs of the schedule are to have effect "subject to the provisions of the will of the deceased, in cases "where there is a reasonably clear indication of the intention "of the deceased; and a fortiori, I think, is that the case "where the will was executed before the coming into force of the "Administration of Estates Act, 1925." Now, in my opinion, that passage shows two things. It shows that the proposition which the learned judge is there enunciating is not limited to wills which were executed before the coming into force of the Administration of Estates Act, 1925. It also shows that the passage which I have read from his judgment in *In re Kempthorne* (1) created no difficulty in his mind when he came to decide *In re Littlewood* (2); and I feel little doubt that that was because the words "per se" are emphatic. In *In re Littlewood* the learned judge found (and, if I may say so, very naturally found) that there was not only a direction to pay debts out of a particular fund but also a clear intention to exonerate therefrom another fund which was disposed of by the testator.

This analysis of that passage, in my judgment, supplies the clue to the case of *In re Gordon* (3) which is a decision of Bennett J. In that case a testatrix by her will gave certain specific legacies and a legacy of 50*l.* in trust thereout to pay debts, funeral and testamentary expenses and to pay any balance remaining to a society. There was no residuary gift. It was held that there was an intestacy as to the residue, and, there being no direction in the will to vary the statutory order of application of assets, the debts, funeral and testamentary expenses of the testatrix were primarily payable out of property undisposed of. In so holding, Bennett J. applied the passage which I have read from *In re Kempthorne* (1). In my judgment, the underlying ground of the decision in *In re Gordon* (2) was that there was no residuary gift. If a testator directs a particular fund to bear debts but makes no other disposition, it is, of course, impossible to hold that he intended to exonerate some other fund. It was, I think, the absence of a residuary gift which led Bennett J. to say at an early point in his judgment (3) : " It is said, and I think truly, that there " has been no case which decides what the interpretation of the " statutory provisions is and what their effect is where a testator " has made such a will as has to be considered in the present " case "—i.e. in *In re Gordon* (2). Moreover, at the end of his judgment the learned judge said this : " In the present case " it is clear that the testatrix has either bequeathed property " for the payment of her debts or has bequeathed property " charged with the payment of her debts. She has made no " other disposition of her property. The facts of the case " plainly fall within the reasoning of Maugham J. with which, " if I may respectfully say so, I entirely agree. Where a solvent testator has made by his will a disposition of property " which falls either within para. 3 of the schedule or within " para. 4 and has made no other disposition of his property and " has not otherwise indicated his intentions, there seems to me " to be no ground for a conclusion that such a testator has " intended to vary or interfere with or alter the order in which " the statute has said that assets are to be applied for the payment of debts and funeral and testamentary expenses." Of those three conditions precedent enumerated by the learned judge only the first applies in the present case ; and, accordingly, it is, in my judgment, quite clear that the decision in *In re Gordon* (2) is not applicable to the present case. On the contrary, *In re Littlewood* (4) is, in my judgment, directly in point and compels me to reach the conclusion which I should have reached independently of all authorities.

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(1) [1930] 1 Ch. 268.
(2) [1931] 1 Ch. 443.
(3) [1940] Ch. 769.

Solicitors : *Vizard, Oldham, Crowder & Cash, for Vizard & Son, Monmouth ; Cunliffe & Airy.*

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(1) [1930] 1 Ch. 268.

(2) [1940] Ch. 769.

(3) Ibid. 772.

(4) [1931] 1 Ch. 443.

H. L. L.

Followed. Re HARRISON'S WILL TRUSTS. [1949] Ch. 678

In re DOUGHTY.

BURRIDGE AND ANOTHER *v.* DOUGHTY AND ANOTHER.

C. A.

1946

Dec. 12, 13.

Morton, Somervell and Cohen L.JJ.

Company—Profits arising from realization of capital assets—Resolution to distribute " by way of capital distribution "—Whether capital or income in hands of recipient shareholder.

It was provided by the articles of association of a limited company that " . . . . the company in general meeting of the " directors . . . . may . . . . pass a resolution . . . . that any " surplus capital moneys or capital profits in the hands of the " company whether arising from the realization of capital assets " . . . . or received in respect of any capital assets . . . . shall be " divided among the members of the company by way of capital " distribution in proportion to their rights." A testator, part of whose estate consisted of shares in the company, directed by his will that the income of the estate should be paid to his widow for her life and that the estate should be held on trust for other beneficiaries thereafter. On a summons taken out by the executors of the will for determination of the question whether sums paid to them as shareholders, as a result of exercise by the company of its powers under the article in question, should be paid to the tenant for life as income or added to the corpus of the estate, the sums in question not having been capitalized under the particular article in the articles of association referring to capitalization of profits, and there being no direction in the will that they were to be treated as part of the corpus of the estate :—

Held, that the article, on its true construction, merely authorized distribution of capital profits, and did not purport to fix their character as between tenant for life and remainderman ; and that accordingly the sums received by the executors must be treated as income and paid to the tenant for life.

Per Somervell L.J. The principle established by *In re Bates ; Mountain* v. *Bates* [1928] Ch. 682, and *Hill* v. *Permanent Trustee Company of New South Wales, Ld.* [1930] A. C. 720, that capital profits distributed by a company during the life of the tenant for life of an estate consisting of shares in the company, though not subject to income tax in the hands of the recipient, fall under the word " income " or similar words in the gift of the estate, is not affected by the fact that one of the company's articles of association prescribes a special procedure to be followed when capital profits are distributed.

In re Bates ; Mountain v. *Bates* [1928] Ch. 682, and *Hill* v. *Permanent Trustee Company of New South Wales, Ld.* [1930] A. C. 720 applied.

In re Ward's Will Trusts [1936] Ch. 704, disapproved.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

C. A.

1946

DOUGHTY, *In re.*

BURRIDGE *v.* DOUGHTY.

APPEAL from Roxburgh J.

A testator, part of whose estate consisted of shares in Consolidated Fisheries, Ld., left the income of his residuary estate to his widow, the first defendant, for life. After her death, in the events which happened, the trustees would be holding the residuary estate as to one-fourth part thereof upon trust to divide the income thereof among the second, third and fourth defendants, during their respective lives in equal shares, and, after the death of each of those defendants, to divide among his issue the capital of the share, the income of which had been given to him during his life. The testator made two codicils to his will, the second codicil after the addition of a new article, No. 104A, to the articles of association of the company. By each of the codicils he confirmed his will except as in the codicil mentioned. He died on March 7, 1941.

Under art. 41 of its articles of association, the company had power to increase its capital. Article 101 gave the usual powers to the directors, before recommending dividend, to create reserve funds. Article 102 provided: "The company "shall in respect of the calendar year 1937 and in respect of "each subsequent calendar year pay out of the profits of the "company or out of moneys standing to the credit of any "reserve fund or funds available for the purpose: (A) To the "management shareholders by way of a non-cumulative "dividend or distribution for such year in priority to any "payment to the ordinary shareholders such sum or sums as "after the appropriate deduction of income tax (if any) at the "standard rate current at the time of payment will leave or "amount to 14,865*l.* per annum such payment to be divided "rateably in proportion to the management shares held by "such shareholders respectively . . . . (B) Subject as afore-"said: To the ordinary shareholders by way of a non-cumu-"lative dividend or distribution for such year such sum or sums "as after the appropriate deduction of income tax (if any) at "the like standard rate will leave or amount to 4,955*l.* per "annum such sum to be paid at such time or times as the "directors may determine and to be divided rateably in "proportion to the ordinary shares held by such ordinary "shareholders respectively: Subject as aforesaid any further "profits which shall hereafter be determined to be distributed "shall be divisible as to three-fourths thereof among the "management shares held by them respectively and as to one-"fourth thereof among the ordinary shareholders rateably in "proportion to the number of ordinary shares held by them "respectively."

Article 104 contained directions that "no larger dividend ". . . . shall be declared or made than is recommended by the "directors," and that "no dividend or distribution shall be "payable except out of the profits of the company whenever "earned whether standing to the credit of the profit and loss "account or any reserve funds available for the purposes of "such dividend or distribution." Article 104A provided, by its first paragraph, for dividends in specie, and, in particular, for dividends by way of capitalization of profits, by the distribution of paid-up shares, debentures or debenture stock of the company.

The second paragraph of art. 104A was as follows: "The "company in general meeting or the directors for the purpose "of carrying out the obligations of the company under art. 102 "may from time to time and at any time pass a resolution to "the effect that any surplus capital moneys or capital profits "in the hands of the company whether arising from the "realization of capital assets of the company or received in "respect of any capital assets or represented by shares or other "property received as consideration or part consideration "for the sale or realization of any capital assets of the company "or any investments representing any such surplus moneys "as aforesaid shall be divided amongst the members of the "company by way of capital distribution in proportion to their "rights and interests in the distributable profits of the com"pany and any such resolution shall be effective and shall be "carried into effect by the directors accordingly."

Acting on the powers conferred by that paragraph, the company in general meeting at the annual general meeting held on February 26, 1946, passed a resolution: "that pursuant to "cls. 102 and 104A of the company's articles of association, "there be and there is hereby declared out of realized capital "profits for payment forthwith and to be divided amongst the "members in proportion to their rights and interests in the "distributable profits of the company, an additional dividend "or distribution to management and ordinary shareholders of "99,100*l.* in respect of the year ended December 31, 1945."

In pursuance of that resolution dividends were sent to the executors of the will, the plaintiffs, in whose names the shares in question were registered, notifying them of the amount which they were entitled to receive. The notice relating to

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the 1,000 ordinary shares registered in the name of one of the plaintiff executors read: "I have to inform you that at the "annual general meeting of the company held this day, an "additional dividend or distribution in respect of the year "ended December 31, 1945, was declared out of the realized "profits of the company, payable forthwith, the sum so payable "to the ordinary shareholders being 24,775*l*. The amount "payable to you in respect of the 100 ordinary shares registered "in your name is 250*l*. a cheque for which amount is enclosed "herewith. As this is a distribution out of capital profits no "income tax is deducted and it is not liable to be included in the "taxation returns of the recipients." Similar amounts were received in respect of the other holdings forming part of the estate, 3,159*l*. being received in respect of the 12,636 ordinary shares and 12,222*l*. 6*s*. 8*d*. in respect of the 148 management shares.

Having received those sums, the executors, not being personally entitled to the benefit of them, took out the present summons to have determined the question whether they ought to be treated as income of the residuary trust fund, or whether they or any part of them should be treated as an accretion to the capital of the residuary fund.

Roxburgh J. held that the whole of the sums ought to be treated as capital and added to the residuary fund.

The tenant for life appealed.

Gray K.C. and *A. C. Nesbitt* for the tenant for life. On principle, a company, while still a going concern, cannot distribute capital, as such, among its shareholders, except by a formal reduction of capital sanctioned by the court: *Bouch* v. *Sproule* (1); *In re Bates*; *Mountain* v. *Bates* (2); and *Hill* v. *Permanent Trustee Co. of New South Wales* (3). The words of art. 104A: "by way of capital distribution," cannot, therefore, give a capital character to the payments received by the shareholders, and they can only mean that the distribution, instead of coming from revenue, comes (as it did here) from realized capital profits, available for dividend but immune from income tax.

In *In re Ward's Will Trusts* (4), which Roxburgh J. purported to follow, the relevant article was distinguishable from the article in this case, but, on any view, it is submitted that that case was not rightly decided in view of the three

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(1) (1887) 12 App. Cas. 385.

(2) [1928] Ch. 682.

(3) [1930] A. C. 720.

(4) [1936] Ch. 704.

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other decisions referred to, with which it is not reconcilable. The payment to the executors here, from whatever source it came, can only be income in their hands.

Harman K.C. and *Wilfred Hunt* for the remaindermen. The question at issue here is the construction of a will, and whether the sum in question is in itself capital or income does not matter. The testator could do as he pleased, and the sole point, to be determined by reference to his will, is whether this sum was intended to go to his widow, the tenant for life, or to the residuary estate. The two cardinal factors in the case are first that the testator left the income of his estate to his widow, and, secondly, that he, being one of the holders of management shares of the company, and having been a party to the arrangement made in 1937 whereby art. 104A was added to the articles of association, was intimately concerned in that matter. In 1940, the testator confirmed his will by a codicil, which he must have framed with the form in mind which the articles had assumed in 1937. The question is whether the testator intended the widow to have any money resulting from such a distribution as authorized in art. 104A. In other words, was that money income in that sense? It is submitted not. The testator meant by the word "income" moneys brought into charge to income tax. That is what men usually mean when they speak of income. The testator did not use the word dividends. In any event, this sum was not a dividend except in the limited sense of something divided out. It represented an increase in the value of the capital of the company. Every will must be construed on its own terms, and what Lord Russell of Killowen in *Hill's* case (1) or Clauson J. in *In re Ward's Will Trusts* (2) held on the wills before them is of no concern here. The words "by way of capital distribution" in art. 104A must refer to what the sum in question is intended to be when it comes to be distributed. They would otherwise be otiose, for the fact that the sum comes out of capital is understood. [*In re Taylor; Waters* v. *Taylor* (3) referred to.] If the sum is not a profit or gain charged to tax—and it is conceded that it is not—it is impossible to suppose that it was intended by the testator to be income in the hands of the tenant for life.

[Somervell L.J. Would our deciding that this sum is income payable to the tenant for life mean that it would become liable to income tax?]

No. That would merely be a decision that this tenant for

(1) [1930] A. C. 720.
(2) [1936] Ch. 704.
(3) [1926] Ch. 923, 930.

life, under this will, was meant to have the sum as income. This is a very large sum; it is not the kind of thing that a tenant for life normally receives. It would require an enormous capital to produce such a sum as income. The company has said that the person who receives the sum is to receive it as capital, and no tax is payable on it. Why, therefore, should it be called income when distributed by trustees?

Danckwerts for the infant defendants.

Cecil Turner for the trustees.

Gray K.C. replied.

Morton L.J. I will ask Cohen L.J. to deliver judgment first.

Cohen L.J. Roxburgh J. arrived at his conclusion mainly as a result of the construction which he placed on the second paragraph of art. 104A of the articles of association. He construed it in the same sense as an article which fell to be considered by Clauson J. in *In re Ward's Will Trusts* (1) Construing the article in that sense, Roxburgh J. considered himself bound to follow that decision.

Before turning to the authorities it will be convenient for me to consider the construction of this article apart from authority, bearing in mind certain general principles, and, in particular, the principle that a company, while a going concern, cannot distribute capital amongst its shareholders except by way of return of capital with the sanction required by the law. It can, of course, distribute capital profits; that is quite a different matter; but it cannot return any paid up capital to its shareholders except with the sanction of the court or in any other way expressly authorized by statute. The second paragraph of art. 104A authorizes the company to " pass a resolution . . . . " that any surplus capital moneys or capital profits . . . . " arising " as therein mentioned " shall be divided amongst " the members of the company by way of capital distribution." Those last are the key words on which Mr. Harman fastened in the course of his argument for the executors. He said that, on their true construction, those words had exactly the same effect as if they read " shall be divided amongst the members " of the company so as to be received by them as capital." That is not, however, in my opinion, their natural meaning. In my view they were merely a repetition, ex abundanti cautela, of the direction that the distribution was to be made out of capital moneys or capital profits.

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(1) [1936] Ch. 704.

Adopting this construction, the case before us is, in my view, indistinguishable in principle from *In re Bates* (1), a decision of Eve J. There there were no such special provisions as are found in the present articles; but an article, in its amended form, provided that no dividends should be paid except out of the profits of the company as shown by the balance sheet. That article did not refer in terms to capital profit, but it was, in my view, in wide enough terms to enable the company there to distribute capital profits. The directors in fact distributed a bonus which they described in these terms: "It "must be clearly understood that this is neither dividend nor "a bonus, but is a capital distribution and therefore not liable "to income tax or super-tax." The circumstances were very similar to those in the case before us, since the sum distributed represented the profits on the sale of steam trawlers which had previously been owned and operated by the company. Eve J. held that, the amount in question not having been capitalized by the issue of bonus shares increasing the total capital, the payments were income receivable by the tenant for life during her life. The nature of the fund was thus referred to by Eve J. (2): "In this state of affairs it was a fund which the "company could treat as available for dividend and could "distribute as profits, or having regard to its power to increase "capital could apply to that purpose by, for example, "increasing the capital, declaring a bonus and at the same time "allotting to each shareholder shares in the capital of the "company paid up to an amount equivalent to his proportion "of the bonus so declared. Unless and until the fund was in "fact capitalized it retained its characteristics of a distributable "profit, and on the authority of the passages which have been "read from Lord Herschell's speech in *Bouch* v. *Sproule* (3), "the only method by which a company with power to increase "its capital can capitalize such a fund is to increase its capital "by an amount equivalent to the sum sought to be "capitalized."

That case was considered by the Privy Council in *Hill* v. *Permanent Trustee Co. of New South Wales* (4), judgment in which was delivered by Lord Russell of Killowen. In that case trustees had received 9*s*. 6*d*. in respect of each fully paid share, a sum which was described by the company in the circular letter from the secretary with which they were distributed, as

(1) [1928] Ch. 682.
(2) Ibid. 687, 688.
(3) 12 App. Cas. 385.
(4) [1930] A. C. 720.

follows (1): " I have been instructed by the directors to advise " that at a meeting held on the 11th instant the board decided " to pay out of the profits of the company a cash dividend of " 9*s.* 6*d.* in respect of each fully paid share in the company . . . . " I have also been instructed to state that the dividend is being " paid out of the profits arising from the sale of breeding stock, " being assets of the company not required for purposes of " resale at a profit, and that it is free of income tax." It was held that the dividend must be treated as income of the trust fund. In the course of his judgment Lord Russell of Killowen laid down five principles which I read as meaning to be statements of general principles, not confined to that particular case. So far as material, they are as follows (2): " (1.) A limited " company when it parts with moneys available for distribution among its shareholders is not concerned with the " fate of those moneys in the hands of any shareholder. The " company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern " to a company which is parting with moneys to a shareholder " whether that shareholder (if he be a trustee) will hold them " as trustee for A. absolutely or as trustee for A. for life only. " (2.) A limited company not in liquidation can make no " payment by way of return of capital to its shareholders " except as a step in an authorized reduction of capital. " Any other payment made by it by means of which it parts " with moneys to its shareholders must and can only be made " by way of dividing profits. Whether the payment is called " ' dividend ' or ' bonus,' or any other name, it still must " remain a payment on division of profits. (3.) Moneys so paid " to a shareholder will (if he be a trustee) prima facie belong to " the person beneficially entitled to the income of the trust " estate. If such moneys or any part thereof are to be treated " as part of the corpus of the trust estate there must be some " provision in the trust deed which brings about that result. " No statement by the company or its officers that moneys " which are being paid away to shareholders out of profits " are capital, or are to be treated as capital, can have any effect " upon the rights of the beneficiaries under a trust instrument " which comprises shares in the company." I pause there to say that if *In re Ward's Will Trusts* (3) can be taken out of that

(1) [1930] A.C. 727.
(2) Ibid, 730, 731.
(3) [1936] Ch. 704.

statement of principle it must be on the ground that the provision there in question was not a statement by the company or its officers but a provision in the articles. " (4.) Other " considerations arise when a limited company with power to " increase its capital and possessing a fund of undivided profits, " so deals with it that no part of it leaves the possession of the " company, but the whole is applied in paying up new shares " which are issued and allotted proportionately to the share- " holders, who would have been entitled to receive the fund " had it been, in fact, divided and paid away as dividend. " (5.) The result of such a dealing is obviously wholly different " from the result of paying away the profits to the share- " holders. In the latter case the amount of cash distributed " disappears on both sides of the company's balance sheet. " It is lost to the company. The fund of undistributed " profits which has been divided ceases to figure among the " company's liabilities ; the cash necessary to provide the " dividend is raised and paid away, the company's assets being " reduced by that amount. In the former case the assets of the " company remain undiminished . . . ." Lord Russell then expressly approves *In re Bates* (1). With these statements and this approval I respectfully agree. It seems to me that, on its true construction, the article which we have to consider, and the resolution passed thereunder, merely authorize distribution of capital profits in such a way as, if possible, not to attract income tax, and do not purport to deal with the question of their character as between tenant for life and remainderman. The moneys were clearly not capitalized under the first paragraph of art. 104A, and I can find nothing in the will directing that they are to be treated as part of the corpus of the estate. Accordingly, they must be treated as income and are payable to the first defendant as tenant for life.

I turn now to *In re Ward's Will Trusts* (2). The relevant article there was as follows (3) : " The company in general " meeting may from time to time and at any time resolve that " any surplus moneys in the hands of the company representing " the moneys received or recovered in respect of or arising from " the realization of any capital assets of the company or any " investments representing the same instead of being applied " in the purchase of other capital assets or for other capital " purposes be distributed amongst the members on the footing

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(1) [1928] Ch. 682.

(2) [1936] Ch. 704.

(3) Ibid, 705.

"that they receive the same as capital and in the shares and "proportions in which they would have been entitled to "receive the same if it had been distributed by way of "dividend." The will directed payment to the tenant for life of the "dividends, interest and annual income" from the shares in question, and Clauson J., basing himself on the provision in the article that the moneys distributed thereunder were to be received by the shareholder as capital, came to the conclusion that they could not be "dividends, interest or annual income" within the meaning of the will. I feel great doubt whether the wording of that article could do more than make it clear that any amount distributed thereunder was free of tax, and whether it was intended to have any bearing on the ultimate destination in the hands of trustees of the moneys distributed in pursuance of it. I do not think, therefore, that the article justified the conclusion which Clauson J. reached. In any event, however, it is distinguishable from the article before us. The appeal must be allowed.

MORTON L.J. I agree. The sums in question must be either part of "the residuary trust fund" within the meaning of the will or part of "the income therefrom," within the meaning of the will. I propose to consider, first, whether these sums are income, in the ordinary meaning of that word, or capital, and secondly, whether there is any reason why the court should give a special meaning to the word "income" in the will.

These sums were dividends; they were distributions of profits, although, it is true, they were distributions of profits sometimes described as capital profits, that is to say, profits resulting from realization of capital assets. As Eve J. said in *In re Bates* (1): "The mere impressing of these distributions "with the appellation of 'capital distributions' cannot in my "opinion determine their true character. One must inquire a "little closer for the purpose of ascertaining whether they were "in fact distributions of capital or distributions of something "which, although in one sense capital, in that it originated "by the realization of assets and not from the ordinary income "of the company's business, could not properly be regarded "as capital for all purposes."

It seems to me that *In re Bates* (2) and *Hill* v. *Permanent Trustee Co. of New South Wales, Ld.* (3) necessitate the conclusion that these payments are not capital but income, as

(1) [1928] Ch. 687.
(2) Ibid. 682.
(3) [1930] A. C. 720.

between the persons entitled thereto, unless the testator has used the word "income" in some special sense in his will. In my view, we cannot find that he has done this. I am not going to assume that in 1940, when he confirmed his will, he had in mind the precise terms of art. 104 A and the fact that that there might be payments to the trustee described as being "by way of capital distribution." Further, I think that, if the testator had thought of this article, and intended that such payments should be treated as capital of his estate and not as income, he would have inserted a special provision in the codicil to that effect.

I do not think that the decision in *In re Ward's Will Trusts* (1) was justified, although the wording of the relevant art., 67A, was not identical with that of art. 104A in the present case. In my view the sum in question in that case came within the words "dividends, interest and annual income to arise "therefrom," in the ordinary meaning of these words, and I do not think that the circumstances justified Clauson J. in giving to them another meaning. It is quite likely that the testator there had not that article in his mind when he made his will. However that may be, I agree that this appeal should be allowed.

SOMERVELL L.J. Before the decisions which have been cited in this case, quite a strong argument could, I think, have been put forward for the view that the word "income" in a will would not, prima facie, extend to any sums except those which were income under the income-tax law. That principle as a principle was negatived in *In re Bates* (2), which has been approved by a decision of the Privy Council (3).

In the light of those authorities, the position can be stated quite shortly: Leaving aside for the moment *In re Ward's Will Trusts* (1), the position, I think, according to those cases, is that, where capital profits are distributed by a company (albeit not subject to income tax in the hands of the recipient), during the life of the tenant for life, they fall under the word "income" or similar words in the will in question. I find great difficulty in reconciling *In re Ward's Will Trusts* (1) with that principle. The fact that there is a special article providing a special procedure when capital profits are to be distributed does not seem to me to affect the principles laid down in *In re*

(1) [1936] Ch. 704.

(2) [1928] Ch. 682.

(3) [1930] A. C. 720.

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Bates (1) and *Hill's* case (2). I am not, of course, referring to the issue of shares or securities on a capitalization of profits, but with distributions of the same general character as that in question here. It may be that *In re Ward's Will Trusts* (3) can be distinguished, but I find great difficulty in reconciling it with the principles which have been laid down. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Peacock & Goddard* for the tenant for life; *Gregory, Rowcliffe & Co., for Ponsonby, Carlile & Booths.*

(1) [1928] Ch. 682.
(2) [1930] A. C. 720.
(3) [1936] Ch. 704.

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1947
Jan. 24.

In re A SOLICITOR.

In re TAXATION OF COSTS

Solicitor — Costs — Payment by retainer — Receipted bill with cash account sent to client abroad — Detailed statement of work done including completing mortgage of reversionary interest—No separate charge given for earlier part of work done—Lump or gross sum charged for whole—No complaint by client—Application by client six years later for delivery of bill of costs or taxation of bill of costs—Scale charges—" Mortgagor's solicitor for negotiating loan "—Solicitors' Remuneration Order, 1882 (*General Order of* 1882), *cl.* 2 (*a*), (*c*) ; *sch.* 1, *part* 1—*Solicitors Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 64, *sub-s.* 1 ; *s.* 66, *sub-ss.* 1, 2—*Solicitors' Remuneration* (*Gross Sum*) *Order,* 1934 (*St. R. & O.* 1934, *No.* 548, *L.*13), *cl.* 1.

In 1940 a solicitor sent to a client who was in Switzerland at the time a receipted bill of costs and a cash account showing that the sum charged in the bill had been paid by retention out of moneys received on the client's behalf. The bill related in part to business done in connexion with a mortgage of a reversionary interest under a Scottish settlement. All the work charged for was particularized in considerable detail, but no separate charge was made in respect of most of the items. A gross or lump sum was charged for them collectively. The client did not even comment on the bill of costs when she received it: and, until 1944, she communicated with the solicitor in terms indicating entire satisfaction with the work done for her by him and his firm, and indeed asked him to act for her in other matters. In 1944, however, she wrote to him that she was about to change her solicitors, and she did so shortly afterwards: eventually, in 1946, she applied by summons for the delivery of a bill of costs under s. 64 of the Solicitors Act, 1932, or for the tax-

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ation of a bill of costs under s. 66 of the Act. In her affidavit she stated that it had always been her intention to have the bill of costs taxed as soon as she was able to give proper instructions for that to be done: and it was suggested in court that she had had difficulty in communicating with the solicitors and was without assistance; but the evidence was that, although there was delay, there was no difficulty, and that she was not alone in Switzerland but had her husband with her:—

Held (1.) that the bill of costs was a statement of charges which fell within the scope of the Solicitors' Remuneration (Gross Sum) Order, 1934, provided that the only business included in it was business the remuneration for which was regulated by cl. 2 (*c*) of the Solicitors Remuneration Order, 1882 (the General Order of 1882): (2.) that, if so, the court would not, in the face of the Order of 1934, make an order under s. 64 of the Act of 1932, unless the client had taken the steps open under the proviso to the order: (3.) that the item "mortgagor's solicitor for negotiating "loan" in part 1 of sch. 1 to the General Order of 1882 was not a scale charge applicable to the business done in the present case, to which no other scale charge was applicable; *In re Furber* [1898] 2 Ch. 538 considered; (4.) that, if that construction of the General Order of 1882 was wrong, the bill could not be a statement of charges delivered pursuant to the Order of 1934, as it could not be said how much of the gross sum charged in the bill was referable to the business of negotiating a loan for which a scale fee would be appropriate: but the court would still have to consider whether it ought, in the circumstances, to make an order under s. 64 of the Act of 1932, since it could not make an order under s. 66 without also making one under s. 64, as the bill of costs was not a "bill" within the meaning of s. 66, and could not be taxed; (5.) that, even if the court were wrong in its construction of the General Order of 1882, it ought not, in the circumstances, to exercise the jurisdiction which it would then have to order the respondents to deliver a bill of costs.

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This was an application for delivery of a bill of costs under s. 64 of the Solicitors Act, 1932, or for the taxation of a bill of costs under s. 66 of that Act (1). On July 31, 1940, a solicitor

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(1) By cl. 2 (*a*) of the Solicitors Remuneration Order, 1882: "In "respect of sales, purchases and "mortgages completed, the re"muneration of the solicitor "having the conduct of the "business, whether for the vendor, "purchaser, mortgagor, or "mortgagee, is to be that pre"scribed in part I. of sch. I. "to this order, and to be subject "to the regulations therein con"tained."

By cl. 2 (*c*): "In respect of "business not hereinbefore pro"vided for, connected with any "transaction, the remuneration "for which, if completed, is "hereinbefore, or in sch. I. "hereto, prescribed, but which is "not, in fact, completed, and "in respect of settlements, mining

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who was a partner in the respondent firm of solicitors wrote to the applicant: ". . . . I am enclosing my firm's receipted bill of costs together with a cash account showing various amounts paid and also retained for your credit . . . ." The letter dealt with many matters with regard to which the solicitor or his firm was acting professionally for the applicant. The accompanying cash account showed a considerable sum credited to the applicant, and showed also how that sum had been disbursed. The only item of importance for the present case was "bill of costs herewith £ . . . ." The sum charged was substantial; the work which the solicitors had done covered a long period and was of a detailed character and of considerable extent. The "bill of costs" was not a "bill" within the meaning of s. 66 of the Solicitors Act, 1932. It contained a long and detailed statement of the work charged for, and although the paper had wide margins on both sides, it was

"leases or licences, or agreements therefor, reconveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in sch. I. hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in sch. I. hereto prescribed, the remuneration is to be regulated according to the present system as altered by sch. II. hereto . . . ."

By s. 56, sub-s. 1, of the Solicitors Act, 1932: "For the purposes of this section there shall be a committee consisting of . . . . (i.) The Lord Chancellor; (ii.) The Lord Chief Justice; (iii.) The Master of the Rolls; (iv.) The President of the Society; (v.) A solicitor, being the president of a provincial law society, nominated by the Lord Chancellor to serve on the committee during his tenure of office as president; and (vi.) . . . . the Chief Land Registrar appointed under the Land Registration Act, 1925."

By sub-s. 2: "The committee or any three of them (the Lord Chancellor being one) may make general orders prescribing and regulating in such manner as they think fit the remuneration of solicitors in respect of non-contentious business and may revoke or alter any such order: Provided that the Chief Land Registrar shall be deemed to be a member of the committee for the purpose only of prescribing and regulating the remuneration of solicitors in respect of business under the Land Registration Act, 1925."

By sub-s. 7: "As long as any order under this section is in operation, the taxation of bills of costs of solicitors shall, subject to the provisions of the next succeeding section with respect to agreements as to remuneration, be regulated by that order."

By s. 64, sub-s. 1: "The jurisdiction of the High Court to make orders for the delivery by

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typed, in single spacing and covered more than three pages. But no detailed charges were made for the greater part of the work done. A lump or gross sum was charged for the whole, and that was the circumstance which raised the issue in the present case. There followed an item for disbursements which was quite considerable: then an item for which, apparently, no charge was made; then came the total sum charged and the words "Delivered and paid July 31, 1940." It was quite clear from the accompanying cash account sent to the applicant that the charges had been paid by retention of the amount out of the moneys which the solicitors had received on the applicant's behalf. The applicant received those documents in August, 1940, in Switzerland. There was nothing to pay and, between 1940 and 1946, she made no comment. The solicitor, in his affidavit filed in the matter, said: "From August, 1940, "when she," i.e., the applicant, "states she received my firm's

"a solicitor of a bill of costs and "for the delivery up of, or otherwise in relation to, any deeds, "documents or papers in his "possession, custody or power, is "hereby declared to extend to "cases in which no business has "been done by him in the High "Court."

By s. 66, sub-s. 1: "On the "application, made within one "month of the delivery of a "solicitor's bill, of the party "chargeable therewith, the High "Court shall, without requiring "any sum to be paid into court, "order that the bill shall be "taxed and that no action shall "be commenced thereon until the "taxation is completed."

By sub-s. 2: "If no such "application is made within the "period mentioned in the last "preceding subsection, then, on "the application either of the "solicitor, or of the party chargeable with the bill, the court "may, upon such terms, if any, "as they think fit (not being "terms as to the costs of the "taxation), order—(*a*) that the "bill shall be taxed; (*b*) that, "until the taxation is completed, "no action shall be commenced "on the bill, and any action "already commenced be stayed; "Provided that (i.) if twelve "months have expired from the "delivery of the bill, or if the bill "has been paid, or if a verdict has "been obtained or a writ of "inquiry executed in an action for "the recovery of the costs covered "thereby, no order shall be made "on the application of the party "chargeable with the bill except "in special circumstances and, if "an order is made, it may contain "such terms as regards the costs "of the taxation as the court "may think fit: (ii.) in no event "shall any such order be made "after the expiration of twelve "months from the payment of "the bill."

By sub-s. 3: "Every order for "the taxation of a bill shall "require the taxing officer to tax "not only the bill but also the "costs of the taxation and to "certify what is due to or by the "solicitor in respect of the bill

"bill of costs and cash account, until she instructed her present solicitors, upwards of a hundred letters and cables passed between her and my firm alone, and indeed she appeared most satisfied and in addition to expressing appreciation from time to time of our continuing efforts on her behalf, in two cases introduced friends of hers living in Switzerland as clients. In addition, in letters and cables, dated April 25, 1942, June 1, 1942, April 20, 1943 and January 26, 1944, she asked and urged me to become a trustee of certain trusts in which she was beneficially interested." The letter dated April 25, 1942, and two of the cables were exhibited to the affidavit. The letter was such as would lead anyone receiving it to believe that the writer was entirely satisfied with the services which were being rendered by the person to whom the letter was addressed: and the same was true of the two cables, the first of which began with the words "many thanks saving serious

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"and in respect of the costs of the taxation."

By sub-s. 4: "If after due notice of taxation, either party fails to attend, the officer may proceed with the taxation *ex parte.*"

By sub-s. 5: "Unless—(i.) the order for taxation was made on the application of the solicitor and the party chargeable does not attend the taxation; or (ii.) the order for taxation otherwise provides, the costs of the taxation shall be paid according to the event of the taxation, that is to say, if one-sixth of the amount of the bill is taxed off, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs: Provided that the taxing officer may certify any special circumstances relating to the bill or the taxation thereof to the court, and the court may make thereon such order as they may think fit respecting the payment of the costs of the taxation."

By cl. 1 of the Solicitors' Remuneration (Gross Sum) Order, 1934: "Without prejudice to the power possessed by the court under the Solicitors Act, 1932, or otherwise, or to the powers conferred upon the solicitor or the party chargeable with the bill under s. 66 of the Solicitors Act, 1932, the remuneration of a solicitor in respect of all business regulated by cl. 2 (*c*) of the General Order of 1882 as amended by any subsequent General Order may at the option of the solicitor be by a gross sum instead of by detailed charges: Provided that within six months after the delivery of a charge made under this Order whether it has been paid or not the client may require that a detailed bill of charges shall be delivered and the solicitor shall thereupon comply with the requisition and any bill so delivered shall be subject to taxation as if the provisions of this Order with respect to the regulation of remuneration by gross sum had not been made."

"situation," and the second with the words "delighted if you "would accept trusteeship marriage contract pending our "return." The word "our" probably referred to the applicant and her husband, who was with her in Switzerland. On March 20, 1944, she wrote to the solicitor: ". . . . You "will, no doubt, have received a telegram from me suggesting "that you should hand over our files to another firm of "solicitors. I am sorry that I should find myself obliged "to send you such a cable, but it seemed quite impossible to "carry on as things were. Mother refuses point-blank to con-"sult you, for reasons which you may understand. I, myself, "know nothing whatsoever of what has transpired between "you, [certain Scottish solicitors] and mother, as no one has "written me at all on the subject. Apart from the above "consideration it is essential that we should have here in "Switzerland an active agent who can communicate direct "with a legal firm in London to explain and elaborate the "various conditions of our day to day life here. I have, "therefore, employed Dr. Wach, who is an English-Swiss "lawyer, and is the agent of [the other firm of solicitors]." That letter made it clear that the applicant was about to change her solicitors, as she was free to do; but, even so, there was not a word of complaint about the charges. In her affidavit the applicant stated: ". . . . It was always my intention to "have the said bill of costs taxed as soon as I was able to give "proper instructions for this to be done . . . ." She did in fact change her solicitors in 1944: but not until January 4, 1946, did she, or, rather, her new solicitor, raise any question with regard to the charges which had been paid by retention on July 31, 1940. On July 18, 1946, this summons was taken out on behalf of the applicant: and the present application before the court was for the delivery of a bill of costs under s. 64, or the taxation of a bill of costs under s. 66.

J. Stirling for the applicant. A bill has not been delivered, and therefore the applicant's right to ask for delivery of a bill still subsists: *In re Baylis* (1). The document which in this case purports to be a delivered bill is not a bill which could be taxed before the Taxing Master: *In re West, King and Adams* (2). If, however, it is a delivered bill of costs, the case is one in which the court ought to exercise its discretion and order it to be taxed, because it is a lump sum bill delivered

(1) [1896] 2 Ch. 107, 114.

(2) [1892] 2 Q. B. 102.

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when a lump sum bill is improper: *In re Pomeroy and Tanner* (1). Even if it is not improper, there are special circumstances in the case, although the applicant may not have taken any overt action to challenge the bill when she received it. Her evidence is that, three months before she received the bill, communications between Switzerland and England were getting worse and worse. She always proposed to contest the bill and would have done so but for the difficulties of communication.

Maurice Berkeley for the respondents. It is conceded that the bill which has been delivered is not an itemized bill within s. 66 of the Act of 1932: and under the general law before 1932 a client was entitled to an itemized bill: see Cordery on Solicitors, 4th ed., p. 381: *Wilkinson and Another* v. *Smart and Others* (2), *Blake* v. *Hummell* (3). Section 66 of the Act of 1932 is dealing with an "itemized" bill in the proper sense, i.e., a bill that can be taxed. [He referred also to s. 56, sub-ss. 1 and 7.] In view of the proviso to the Solicitors' Remuneration (Gross Sum) Order, 1934, a client who neither goes to the court under s. 64 of the Act of 1932 nor takes the steps open under the proviso loses the right to have the bill taxed. That is exactly what has happened in the present case, and s. 66 of the Act of 1932 does not apply. Retention is payment, provided that a bill clearly referable to the payment is delivered afterwards: see *In re Thompson* (4). [He referred to *Hitchcock* v. *Stretton* (5).] In the present case it is clear beyond dispute that the payment related to the gross sum charge delivered to the applicant, who is not now entitled to come to the court and ask for any discretion whatever.

[Roxburgh J. In *In re Furber* (6) it was held, as stated in the headnote, that the scale fee to "mortgagor's solicitor for "negotiating loan," provided for by sch. I. to the General Order under the Solicitors' Remuneration Act, 1881, is applicable to all cases of loans on mortgage, and is not confined to loans upon mortgage of freehold, copyhold or leasehold property exclusively.]

No part of the charge in the present case is referable to "negotiating loan." The case is not one in which the applicant ought to have relief. Not only did she not ask for details of the bill: she sat by, and, even after she had changed her solicitors in 1944, she still did nothing until 1946.

(1) (1897) 75 L. T. 625.
(2) (1876) 33 L. T. 573.
(3) (1884) 51 L. T. 430.
(4) [1894] 1 Q. B. 462.
(5) [1892] 2 Ch. 343.
(6) [1898] 2 Ch. 538.

[Roxburgh J. I cannot think that it is the practice of solicitors to follow *In re Furber* (1) in such a case as the present.]

Stirling in reply on *In re Furber* (1). The decision seems quite clear. It was argued that scale fees did not apply, because certain parts of the land in question were not freehold or leasehold. Kekewich J. said, in effect, that that could not be a defence because, in such cases, there is a scale fee which applies

[Roxburgh J. It has to be faced that *In re Furber* (1) does not cover the present case, and that the point which arises in the present case was not put to Kekewich J.]

The court's discretion under s. 64 is not limited, and the case is one in which it ought to be exercised.

ROXBURGH J. stated the facts, and continued as follows: If the applicant always intended to challenge the bill of costs, it seems to me unfair to have gone on inviting the respondent firm to continue to act for her, not only in old matters but in new, without suggesting any dissatisfaction with the charges or indicating her intention to try to reopen a paid account. Though a great deal has been said in argument about the supposed difficulty of communicating her intentions and feelings to the respondents, she did in fact succeed in communicating with them on some one hundred occasions after August, 1940, and before she changed her solicitors, and I have no reason to doubt that she was able to do so without any substantial difficulty although, possibly, with some delay, on every matter on which she desired to do so. I have already pointed out that the bill of costs contained what I think is commonly called a gross sum or a lump sum charge, and it has been conceded that whatever may be the position now, a statement of charges in that form was not a " bill " within s. 66 of the Solicitors Act before the Solicitors Remuneration (Gross Sum) Order, 1934, came into operation.

His Lordship read cl. 1 of the order and continued as follows: The statement of charges in the present case seems to me to fall within the scope of that order, provided—and that is a question which I still have to consider—that the only business included therein is business, remuneration for which is regulated by cl. 2 (*c*) of the General Order of 1882. If it is, in my judgment, the court would not, in the face of that order, make an order under s. 64 of the Solicitors Act, 1932, unless the client had

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(1) [1898] 2 Ch. 538.

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taken the steps open to him or her under the proviso to the order.

Therefore, the main question for me to consider is whether all the business to which this statement of charges relates is business regulated by cl. 2 (*c*) of the General Order of 1882. All non-contentious business is within cl. 2 (*c*) of the General Order unless it falls within some other provision of that order. The only provision in the General Order other than 2 (*c*) which could possibly apply to this case is cl. 2 (*a*).

His Lordship read cl. 2 (*a*), and continued as follows: Undoubtedly there was in this case a " mortgage completed." The evidence about that mortgage is vague but the mortgaged property seems to have been in Scotland and it has not been contended that it could be described as a mortgage of freehold or leasehold property in England.

Cordery on Solicitors, 4th ed., p. 348, makes the following observations with regard to part I of sch. I to the Remuneration Order 1882 : " The scale fees in sch. I do not " apply (A) To land situate out of the jurisdiction . . . . " (C) To property other than freehold, [copyhold,] or leasehold " but query as to the fees for negotiating sales, purchases and " loans. The scale fee for negotiating a loan applies though the " loan is not exclusively on real or leasehold property." It is plain, therefore, that I must investigate sch. I further. The only item in part I of sch. I which could apply to any of the business transacted by the respondent firm is : " Mortga- " gor's Solicitor for negotiating loan." It is quite plain that the item for investigating title, for example, cannot be applicable, and that no scale fee is prescribed for the bulk of the work done. But a loan on mortgage was negotiated.

Therefore I have to consider very carefully the decision of Kekewich J. *In re Furber* (1). I am bound by that decision, though not by any observations in the judgment which may have been unnecessary for the purposes of that decision. In the case of *In re Furber* there was a mortgage of freehold or leasehold property within the jurisdiction, and there were other scale charges which were applicable besides the scale charge for negotiating a loan ; and Kekewich J. began his judgment as follows : " The question raised on this summons " is one of general importance to the profession. It is whether " a solicitor can charge a scale fee for negotiating a loan though " the loan is not to be advanced on a mortgage of freehold,

(1) [1898] 2 Ch. 538.

" copyhold or leasehold property exclusively." That language, if I may presume to say so, precisely stated the point raised by the facts of that case. The learned judge concluded his judgment by saying: " The result is that I must remit the " matter to the Taxing Master with an intimation of my opinion " that Mr. Furber is entitled to charge the scale fee for " negotiating loan, notwithstanding that there was no mortgage " of freehold, copyhold or leasehold property exclusively." That, again, was a decision on the precise point raised in that case, and if any freehold or leasehold property in England had been mortgaged in the present case it would have bound me. But in that event, of course, other scale fee charges would have been applicable also. In reaching his conclusion, however, Kekewich J. used language which does seem to me to go beyond the case which he had to decide and to apply even where no freehold or leasehold property within the jurisdiction is subject to the mortgage, and where no other scale fee is applicable because he says (1): " My conclusion—and I am bound to " say that but for the opinion of the Taxing Master I should " have had very little hesitation about it—is that ' negoti-" ' ating loan ' means ' negotiating loan ' of any kind provided " the loan is on mortgage. It would not, for instance, include " the case of a loan upon a promissory note, or money borrowed " from bankers without any specific security. I think it is " erroneous to suppose that because some property comprised " in a mortgage is not of the particular kind to which title is " deduced, or of which the title is investigated in the manner " indicated in the schedule, therefore the scale fee for " negotiating ought not to be charged." In so far as that language extends, as I think it does extend, to a case in which no freehold or leasehold property within the jurisdiction is subjected to any mortgage and in which no other scale fee is applicable, though it carries great weight, it is not binding on me, and I cannot bring myself to hold that the item " Mortga-" gor's Solicitor for negotiating loan " is a scale charge which is applicable to business of the character indicated in the statement of charges which I have before me, and to which no other scale charge is applicable.

If my conclusion is well founded, it must make an end of the application. But if I am wrong in my construction of the General Order, then the respondents could not rely upon the statement of charges as one delivered pursuant to the Gross

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(1) [1898] 2 Ch. 538, 543.

Sum Order because it is impossible to say how much of the gross sum charged is referable to the business of negotiating the loan for which a scale fee would be appropriate. Accordingly, I should have to consider whether, in the circumstances of this case, I ought to make an order under s. 64. I could not make an order under s. 66 without making an order under s. 64 because, on the hypothesis which I am now considering, there would be no bill within the meaning of s. 66. Accordingly, the question would be whether I ought to make an order under s. 64 for delivery of a bill and an order under s. 66 for taxation of the bill so delivered. Counsel have conceded that I am neither guided nor constrained by any reported case in considering whether I ought to exercise my jurisdiction under s. 64 to make an order for delivery of a bill. The question whether a scale charge ought or ought not to have been made is, from a practical point of view, of small moment in the present case, though from a legal point of view it is, of course, most important. The applicant by implication admits that she realized both the amount which she had been charged and the work in respect of which that amount had been charged within a month of the date on which the bill was delivered and the charge was paid by retainer, because she says that she always intended to have the bill taxed. Realizing all that, she not only refrained from raising any question about it, but continued to employ the respondent firm for several years afterwards in relation to both old and new business, and expressed appreciation of their services in one direction or another on several occasions. The evidence was that some hundred letters and cables passed. Even when she notified the respondents that she was about to change her solicitors and when, therefore, she could have no possible ground for withholding from them the information that she had always intended to have the bill taxed, she did not make any suggestion of any such intention; nor until 1946 was any such suggestion made to the respondents. It is suggested that she had difficulty in communicating with the respondents. It is quite plain that she had none. There may have been some delay, but she found no difficulty in communicating with them; she did so over and over again, and, apparently, on every matter with regard to which she desired to do so. It is suggested that she was without assistance, but her husband was with her in Switzerland. It seems to me that, in the circumstances which I have indicated, even if I am wrong in my construction of the General Order of 1882, I ought not to exercise the jurisdiction which I should undoubtedly have in that event to order the respondents to deliver a bill of costs.

Accordingly I must dismiss the application with costs.

Solicitors: *Ridsdale & Sons; Kenneth Brown, Baker, Baker.*

K. R. A. H.

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Distinguished. Re VISCOUNT GALWAY'S WILL TRUSTS. [1949] 2 All E.R. 419.

In re HARVEY. PUBLIC TRUSTEE *v.* HOSKEN.

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Jan. 23, 29.

Will—Construction—Devise in will made before 1926 *of "all my parts "or shares" in certain farms—Imposition of statutory trusts—Codicil made in* 1927*—No confirmatory clause—No ademption—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20) *Sch.* 1, *Part IV., para.* 1 (4).

The testator by his will dated November 7, 1912, devised and bequeathed to his trustees "all my parts or shares in the estates "or farms of D., C. and F. and all other my lands in the parish "of S." upon trust for sale and investment and to pay the net income therefrom to his daughter for her life and by a fourth codicil to his will he directed that after the death of his daughter his lands and hereditaments in the parish of S. should be held in trust for her two sons. The testator made five codicils to his will, four being executed before January, 1926. The last, dated January 15, 1927, contained no disposition of any kind, nor did it confirm any preceding testamentary document. It was described as a codicil to the testator's will of November 7, 1912, and merely recorded the cancellation and destruction of the testator's second codicil. The testator died on March 30, 1929. At the date of his will in 1912 he was entitled to eight undivided fifteenth shares of D. and C. farms and to eight undivided tenth shares of E. farm. He did not at any time own any other land in the parish of S. Under the transitional provisions contained in the Law of Property Act, 1925, sch. I, part IV., para. 1 (4.) the three farms vested on January 1, 1926, in the Public Trustee upon the statutory trusts. All three farms were unsold at the date of the testator's death. The question was raised whether the imposition of the statutory trusts had adeemed the devise of the shares in the farms:—

Held, that the fifth codicil republished the testator's will constructively. The gift in question was accordingly not adeemed.

In re Newman [1930] 2 Ch. 409 distinguished; *In re Warren* [1932] 1 Ch. 42 followed.

ADJOURNED SUMMONS.

By his will, dated November 7, 1912, Samuel Harvey, after

[Reported by Miss B. A. BICKNELL, Barrister-at-law.]

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appointing the Public Trustee to be sole executor and trustee thereof, and devising his freehold house known as " Sea View " upon trust for his wife and his daughter Ellen Muriel Harvey successively for life, gave, devised and bequeathed unto his trustee " a sum of 2,000*l.* Local Loans Stock . . . . and also " all my live and dead farm stock on my farms in the Parish " of Sancreed, Cornwall and also all my parts or shares in the " estates or farms of Derval, Chegwidden Vean and Ennismanen " and all other my lands in the said Parish of Sancreed and also " (from and after the death of the survivor of my said Wife " and my said daughter Ellen Muriel Harvey) my said residence " ' Sea View ' Upon trust to sell the said farm stock and invest " the proceeds thereof in securities authorized by law for trust " investments with power to postpone such sale . . . . And to " hold my said estates and lands or parts or shares of estates " and lands in the said Parish of Sancreed and the said Local " Loans Stock or sum of money and the said farm stock or " proceeds thereof," subject to the payment of certain annuities upon trust for his daughter, the defendant, Mrs. Louie Evans Hosken for her life and after her death in trust for her issue. He gave the residue of his real and personal estate to his wife and Miss Ellen Muriel Harvey in equal shares as tenants in common absolutely.

The testator made five codicils to his will, four being made before January 1, 1926. By the third, he revoked an annuity given to Miss Ellen Muriel Harvey and he gave her instead the share of his residuary estate, which he had given to his wife by his will. By the fourth codicil, dated June 17, 1924, he directed that after the death of Mrs. Hosken his lands and hereditaments in the Parish of Sancreed, Cornwall, and the sum of 2,000*l.* Local Loans Stock or the equivalent thereof, and the proceeds of his farm stock in the said Parish of Sancreed should be held in trust for the two sons of Mrs. Hosken, the defendants, Frank Harvey Hosken and Leonard Henry Hosken, in equal shares as tenants in common absolutely. By the fifth codicil, dated January 15, 1927, which was stated to be a further codicil to his will (of November 7, 1912) the testator stated that he wished to place on record the cancellation and destruction of his second codicil with intention to revoke it. The fifth codicil made no disposition of any kind and contained no express confirmation of the will.

The testator died on March 30, 1929, his wife having predeceased him. At the date of the will the testator was entitled

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to eight undivided fifteenth shares of Deval and Chegwidden Vean Farms and to eight undivided tenth shares of Ennismanen Farm. Neither at that date nor the date of his death did he own any other land in the parish of Sancreed. On January 1, 1926, the farms vested in the Public Trustee under the transitional provisions contained in the Law of Property Act, 1925, sch. 1, Part IV., para. 1 (4.) upon the statutory trusts for sale. The farms were unsold at the date of the testator's death.

By this summons, the Public Trustee asked whether the gift in the testator's will of "all my parts or shares" in the farms was adeemed by the coming into operation of the Law of Property Act, 1925, in his lifetime.

Rawlence for the plaintiff.

Pennycuick for the defendants, Mrs. Hosken, Frank Harvey Hosken and Leonard Henry Hosken. Here there is no ademption. If there had been no codicil it would have been difficult to contend that there was no ademption in view of Farwell J.'s decision in *In re Newman* (1). The gift is reaffirmed by the fifth codicil and ademption negatived: *In re Warren* (2). The omission from the codicil of a confirmatory clause is immaterial. The decision in *In re Warren* (2) was based on the principle that a codicil is a re-publication of a will. A codicil reaffirms a will whether it contains a confirmatory clause or not. He referred to *In re Sebag-Montefiore* (3) and to *Berkeley* v. *Berkeley* (4) per Lord Porter.

Belsham for the personal representatives of Miss Harvey the residuary legatee. It is conceded that if it were not for the codicil this case is covered by *In re Newman* (1). The decision in *In re Warren* (2) should not be followed as it is inconsistent with that in *In re Kempthorne* (5). The codicil is relied on as bringing the will up to its own date, so that the gift of land is treated as a case of falsa demonstratio. This is based on the theory that the will is rewritten in the codicil: *In re Tredgold* (6). In *Berkeley* v. *Berkeley* (4) Lord Simonds withdrew the opinion he expressed in *In re Tredgold* (6). If the decision in *In re Warren* (2) is justified where there is an express confirmation of the will by the codicil, the case has no application where, as here, the codicil contains no such confirmation.

Cur. adv. vult.

(1) [1930] 2 Ch. 409.
(2) [1932] 1 Ch. 42.
(3) [1944] Ch. 331.
(4) [1946] A. C. 555, 575.
(5) [1930] 1 Ch. 266.
(6) [1943] Ch. 69.

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Jan. 29. VAISEY J. read a judgment, in which (after stating the facts as above) he said: At the date of his will, the testator was entitled to eight undivided fifteenth shares of Derval and Chegwidden Vean farms, and to eight undivided tenth shares of Ennismanen farm, but he did not at any material time own any other land in the parish of Sancreed. Under the transitional provisions of the Act, the three farms became vested in the Public Trustee upon the statutory trusts, and they have, in fact, recently been sold. On and after January 1, 1926, the testator, it is said, ceased altogether to own any parts or shares in the farms, and acquired instead of those parts and shares corresponding fractional interests in the proceeds of the sale of them under the statutory trust for sale. The quality and whole nature of his property was, it is said, fundamentally changed, so that that which he purported to dispose of by his will had, previously to his death, been taken away from him, or, in other words, it was adeemed, and his new substituted statutory interest did not pass by the disposition of his previous interest, but fell into his residuary estate.

Apart from authority, I think that a very strong case could be made against the suggested ademption. I would, myself, hesitate to draw fine distinctions between such expressions as "parts or shares in," "parts of or shares in," "parts or shares "of," "right title and interest to or in," and other similar variants. The questions I would propound to myself are whether, after the Act came into force, the owner of an undivided share in land had or had not still his part of the land, or his part in the land, or his share in the land, or his share of the land, or his right or title to the land, or his interest in the land, and if to each and every of these questions either a plain affirmative or else a plain negative answer must be given, it might well be thought that the affirmative would be nearer to the truth. After all, the object of the Act, in this regard, was to provide improved machinery, and not to affect, more than necessary, the beneficial interests of landowners. I may observe that the testator uses the two expressions "parts or "shares in" and "parts or shares of." I agree, of course, that my questions, if put to a conveyancer, would have a technical significance, and that they, or some of them, would be answered by him in the negative. I venture to think, however, that, on a matter such as this, the testator's language ought to be taken in its popular rather than in any technical sense. True it is that his will was probably prepared by a lawyer, but I can hardly attribute to the latter in 1912 any sort of prescience of the legislation of 1925.

Until recently all the parties in this case have proceeded without regard to a possible ademption, but this, of course, can in no way affect my decision of the point. I must now refer to the authorities, and see how far I am obliged to follow them, and what guidance they afford me. The point appears to have arisen first in connexion with the incidence of estate duty. In the case of the *Attorney-General* v. *Public Trustee* (1), Rowlatt J. followed the decisions of Eve J. in *In re Mellish* (2), and Tomlin J. in *In re Wheeler* (3), by holding that there was for that purpose no change in the nature or quality of the property, which remained real estate. In the case before Eve J. the words were " all my share and interest in " a certain estate, and, in the case before Tomlin J., " all my real estate and " undivided shares of real estate in the County of York." Then, in the case of *In re Price* (4), Clauson J. surveyed the new Acts, as they then were, and said : " The result of this survey " of the New Acts seems to show that on January 1, 1926, " Thomas John Price ceased to have any estate in the fourteen " acres or any part of it and became entitled to an equitable " interest in the proceeds of sale of the fourteen acres— " namely, such interest as might be requisite for giving effect " to his rights as a person interested in the land. In my " opinion such an interest is an interest in personal estate. " By the statutory imposition of a trust for sale the land has, " so far as beneficiaries are concerned, been converted into " money, and Thomas John Price has an interest in the money. " This view of the effect of the Act seems to me not only to be " sound in principle but to accord with such decisions as " *Richard* v. *Attorney-General of Jamaica* (5) and *Frewen* v. " *Frewen* (6), which recognize that the usual consequences of " conversion follow whether the conversion is effected by " agreement or compulsorily by Act of Parliament. The " provisions with which I have to deal which turn a copyhold " estate into a beneficial right in a fund arising under a trust for " sale seem to me to be analogous to the provisions which " notionally converted, in the one case cited, slaves, and in the " other case cited, an advowson, each real property, into a " money claim for compensation."

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(1) [1929] 2 K. B. 77.

(2) [1929] 2 K. B. 82 *n.*

(3) [1929] 2 K. B. 81 *n.*

(4) [1928] Ch. 579, 589.

(5) (1848) 6 Moo. P.C. 381.

(6) (1875) L.R. 10 Ch. 610.

I come next to *In re Kempthorne* (1). I will read so much of the headnote as is material: "By his will dated December 2, "1911, a testator devised to his brother Charles 'all my freehold "'and copyhold property,' and gave all his leasehold property "and personal estate and effects, subject to payment of his "funeral and testamentary expenses, debts and legacies upon "trust for division amongst his brothers and sisters as therein "mentioned. The testator died on August 15, 1928, and was "at his death entitled (subject to the effect of the provisions "of the Law of Property Act, 1925) to two equal ninth shares "of certain freehold property comprised in his father's "residuary estate, and to one equal fourth part of certain "freehold minerals purchased by him. He also owned the "entirety of certain other freehold property. The residuary "gift of personalty lapsed as regards three equal seventh parts "owing to the death of two legatees in the testator's lifetime. "Held, (1.), that as the land held in undivided shares was by "the Law of Property Act, 1925, sch. 1, part IV, para. 1 "and s. 35, subjected to a trust for sale as from January 1, "1926, the testator's interest in undivided shares of freehold "property was then converted into personal property and "passed on his death under the gift of personal property." On this point, Maugham J. as he then was, and the Court of Appeal were in agreement. They approved and followed *In re Price* (2), and distinguished *In re Wheeler* (3) and *In re Mellish* (4). Maugham J. after reading the passage which I have just quoted from the judgment of Clauson J. in *In re Price* (2), expressed the view that he was bound to follow the decision in that case. In the Court of Appeal Russell L.J. said: "I desire to add nothing to the judgment of Clauson J. in "*In re Price* (2), which was adopted and approved of by "Maugham J. in his judgment in the present case. As "regards the two other cases which Mr. Grant relied upon, "the cases before Eve J. and Tomlin J., they are in my opinion "distinguishable. So far as *In re Mellish* (4), the case before "Eve J. is concerned, the terms of the disposition contained "in the will under consideration were such as to cover the "interest, whether it was freehold property or whether it was "personal estate. The gift there was of 'all the testator's "'share and interest' in a certain estate. In *In re Wheeler* (3), "the case before Tomlin J., the distinguishing feature, in my

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(1) [1930] 1 Ch. 268, 274, 293.

(2) [1928] Ch. 579.

(3) [1929] 2 K. B. 81 *n.*

(4) [1929] 2 K. B. 82 *n.*

VAISEY J.

1947

HARVEY, *In re.* PUBLIC TRUSTEE *v.* HOSKEN.

"opinion, was that although the testator's devise was of all his "real estate and undivided moiety of his real estate in the "county of York, he had, after the Act had been passed, made "a codicil by which he confirmed his will; so that his testa-"mentary disposition had to be treated as one made at the "date of the codicil. The learned judge must necessarily have "taken the view that, when the testator used that language, "he must have been intending to apply it to the interest, "whatever it was, which he had in the real estate or undivided "share of real estate in the county of York. Those two cases "are, in my opinion, distinguishable; but if they do by any "chance conflict with the decisions of Clauson J. in *In re* "*Price* (1) and of Maugham J. in the present case, I prefer their "views to any views inconsistent with them, which may be "involved in the decisions in the other two cases."

I now come to *In re Newman* (2). In that case, the testator made his will on May 15, 1922, and devised all my "moiety or "equal half part or share and all other my share in" certain hereditaments to his brother John, they being then tenants in common of the property in equal undivided moieties. The effect of the Act was, of course, on January 1, 1926, to vest the entirety of the hereditaments in the testator and John, as joint tenants on the statutory trusts. The testator died on January 29, 1929, without having either altered or confirmed his will, and it was held by Farwell J. that the specific devise was adeemed by the imposition of the statutory trusts so that John took nothing thereunder. The learned judge said: "The "result is this. If the testator uses language that can only be "construed as a devise of real estate, and, notwithstanding the "imposition of the statutory trusts, he dies without altering "or confirming his will, the conversion effected by the statutory "trusts adeems the devise, because there is nothing left for "that devise to operate on. If on the other hand the testator "uses language wide enough to carry any interest in the property "whether it be in law real or personal property, the conversion "is immaterial. I have therefore to determine the true "construction of the testator's language in the present case. "It is in my judgment not apt to pass anything but a moiety "of real estate, and as there is no real estate left the devise "does not operate. It may well be that this result is not in "accordance with what the testator would have intended if he "had considered the matter, but I am not concerned with that.

(1) [1928] Ch. 579.

(2) [1930] 2 Ch. 409, 417.

"I am only concerned with his language, i.e., his expressed "intention. The whole devise therefore fails."

The point next came before Maugham J. in *In re Warren* (1) There, by a will made in 1923, a testatrix devised her "share "in" certain land (actually an undivided fourth share) to a named devisee. By a codicil made in 1927 (that is, after the imposition of the statutory trusts) she made certain alterations in her will and, subject thereto, she confirmed it. The codicil did not refer to, nor did it in any way affect, the devise. It was held that there was no ademption, and that the interest of the testatrix in the proceeds of sale went absolutely to the devisee. Maugham J. said: "It is not correct to say that the testatrix "was entitled only to a share of the proceeds of sale. She "had certain other rights. Apart from the recent legislation, "there can be no question but that the devise was an effective "devise to Mr. Warren; and the question for decision is "whether, as the result of the recent legislation, the devise has "been adeemed by operation of law. In considering that "question it is important to note that the legislature has not "deprived the testatrix of all interest in the land. The "'statutory trusts' (the meaning of which expression is set "out in s. 35 of the Law of Property Act, 1925) are shortly to "sell and hold the net proceeds on such trusts as may be "requisite for giving effect to the rights of the persons interested "in the land. Then, by an amendment in the schedule to the "Law of Property (Amendment) Act, 1926, it is enacted, in "substitution for s. 26, sub-s. 3, of the Act of 1925, that "'trustees for sale shall so far as practicable consult the "'persons of full age for the time being beneficially interested "'in possession in the rents and profits of the land until sale "'and shall, so far as consistent with the general interest of the "'trust, give effect to the wishes of such persons, or, in the case "'of dispute, of the majority (according to the value of their "'combined interests) of such persons, but a purchaser shall "'not be concerned to see that the provisions of this sub-"'section have been complied with.' Having regard to the "provisions of that sub-section, it is clear that trustees for sale "would be acting wrongly, in general, in selling, if undivided "beneficial owners required them not to sell. There is no "doubt that, since the coming into force of the Law of Property "Act, 1925, the position of undivided owners is different from "what it was before. That Act, for the purpose of simplifying

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(1) [1932] 1 Ch. 42, 46, 50.

"the law, has introduced provisions for undivided shares, and "has made partition actions unnecessary and obsolete. But "in substance the beneficial interests of the undivided owners "in regard to enjoyment so long as the land remains unsold "have not been altered, and it is true to say that the ordinary "layman possessed of an undivided share in land would be "quite unaware of any alteration in his rights as the result of "the Act." After referring to *In re Newman* (1), Maugham J. said: "I should be disposed to follow that decision in a case "that was like it. But I think it right to say that I attribute "weight in these cases to the consideration that the result of "the statutory trusts is not wholly to deprive the person "previously entitled to an undivided share of all interest in "the land: and the language of the testator may well be such "that that consideration may result in the decision that there "is no ademption."

For myself, I am satisfied that Maugham J. was reluctant to follow, and anxious to distinguish, *In re Newman* (1), a reluctance and an anxiety which I feel and share in the present case. That learned judge was not, I think, convinced of the accuracy of that decision, nor, if I may respectfully say so, am I. He found himself able to come to the opposite conclusion in *In re Warren* (2) by differentiating it from *In re Newman* (1) by reason of the existence of the post-1925 codicil. This he did after considering *Powys* v. *Mansfield* (3), *Oakes* v. *Oakes* (4), and *In re Slater* (5).

But for the existence of a post-1925 codicil in the present case, I should have felt constrained to disregard any doubts I may entertain as to its correctness, and to follow the decision of Farwell J. in *In re Newman* (1). There is a difficulty in that the fifth codicil here is, as I have already indicated, of a very tenuous character. All that it does is to place a certain fact on record, a thing that might have been done with equal efficacy by a statutory declaration, or other non-testamentary document. On the other hand, it does contain an express reference to the will, suggesting that the testator must have been looking at it, though, perhaps, only for the purpose of refreshing his memory as to its date. The fact remains, however, that it calls itself a codicil, was executed as such, and has been admitted with the testator's other testamentary documents to probate. As I understand the matter, a codicil described as a codicil to a particular will republishes that will. (See and distinguish *In re Smith* (1), and see the observations of Lord Porter in *Berkeley* v. *Berkeley* (2).)

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(1) [1930] 2 Ch. 409.

(2) [1932] 1 Ch. 42.

(3) (1837) 3 My. & Cr. 359.

(4) (1852) 9 Hare 666.

(5) [1907] 1 Ch. 665.

The case of *In re Hardyman* (3), is also, I think, in point. I will read the headnote: " A testatrix, by her will made in " 1898, bequeathed a legacy of 5,000*l.* ' in trust for my cousin " ' his children and his wife failing his children upon his death " ' and that of his wife or until she marries again the said sum " ' of 5,000*l.* to be divided ' in manner therein mentioned. " The cousin of the testatrix was, at the date of the will, " married to his first wife and she died in January, 1901. " In November, 1901, the testatrix, with knowledge of the death " of her cousin's first wife, made a codicil to her will, in which " she made a bequest of a sum of stock and appointed a " residuary legatee. The codicil contained no reference to the " bequest of 5,000*l.* In 1903 the cousin of the testatrix re-" married. He died in 1924. There was no issue of either " marriage. This summons raised the question whether the " second wife was entitled to benefit under the bequest of " 5,000*l.* :—Held, that the will and codicil must be read " together, and that the second wife was entitled to an interest " in the 5,000*l.* for her life or until remarriage." The absence of any express post–1925 confirmation of the will does not, in my judgment, affect the matter, and it is to be observed that the codicil in *In re Hardyman* (3) did not confirm the will.

I have come to the conclusion that the fifth codicil sufficiently republishes, constructively, as it is said (see Jarman on Wills, 7th ed., at p. 184), the testator's will so as to prevent or preclude ademption. I shall therefore declare that the gift in question was not adeemed.

Solicitors: *Bird & Bird, for Borlase & Denning, Penzance; Hatchett Jones & Co.; Winter & Co., for Spencers, Plymouth.*

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(1) [1916] 2 Ch. 368.

(2) [1946] A. C. 555, 575.

(3) [1925] Ch. 287.

SALES AFFILIATES, LIMITED *v.* LE JEAN, LIMITED.

EVERSHED J.

1947

Jan. 22, 23, 24, 28.

Trade mark — Process — Permanent hair-waving — Alleged passing off —Use of secret materials for process—Substitution of other materials —Trade witnesses' evidence—Declaration of right without injunction.

The plaintiff company under the trade-mark "Jamal," marketed appliances and materials for the process of permanent hair-waving, and supplied them only to hairdressers to be used on customers asking for their largely advertised "Jamal" permanent hair-wave. They alleged that the defendants, ladies' hairdressers, when asked by customers for a "Jamal" hair-wave, a service which they offered to give, used other materials than those supplied by the plaintiffs and they claimed an injunction to restrain passing off and damages. "Trap-orders" were given by two witnesses sent by the plaintiffs to be given a "Jamal" hair-wave, and their evidence was that the defendants' assistants used some sachets containing materials not supplied by the plaintiffs, but there was no evidence by any ordinary member of the public that she had been deceived and had not been given what she asked for :—

Held, that a "Jamal hair-wave" meant a machineless operation in which materials exclusively supplied by the plaintiffs were used, that there was sufficient evidence to show that there was, at least, a probability of deception of customers by the defendants and therefore the plaintiffs were entitled to a declaration that the defendants in offering their customers a "Jamal" hair-wave must use only the "Jamal" sachets and lotion in giving it, and no substitutes, but no injunction would be granted, and only nominal damages awarded.

In such a case where no articles are actually sold to the public, evidence from trade witnesses may be sufficient to prove passing-off.

ACTION.

The facts as stated by his Lordship in his judgment were as follows. The plaintiffs, Sales Affiliates, Ld., sought an injunction to restrain the infringement by the defendants Le Jean, Ld., of what they alleged to be their rights in relation to the use of the word "Jamal" in its application to permanent hair waving.

The plaintiffs, who were incorporated in the year 1939, among other activities marketed a lotion and certain sachets which were made for them, and in connexion with that lotion and those sachets they were the registered proprietors of trade marks, "Jamal," and "Vapet." The plaintiff company themselves did not manufacture, and never manufactured, any of those articles, nor were they the inventors of the prescriptions which were used in the making up of the lotion or the sachets. Both the lotion and the sachets were in fact manufactured by another company, Evans Chemicals, Ld. The composition of those products was a secret of that company. There was no agreement in any formal shape whereby Evans Chemicals, Ld., manufactured these articles according to any particular specification, or for the exclusive marketing of the plaintiff company. According to the evidence of their representative they were manufactured according to uniform specifications, and were supplied and supplied only to the plaintiff company, according to what was called a gentleman's agreement. They were marketed by the plaintiff company, and the marketing consisted in their sale by the plaintiff company to hairdressers and similar trading establishments for use by them in the process of permanent waving. In addition to those marketing operations it was proved that the plaintiff company, since 1939, but including the year, 1946, expended a considerable sum of money, to wit 109,000*l.* or thereabouts, in the advertising of the system of hair waving which they have associated with the name "Jamal." Permanent hair-waving was said to consist first of treatment of the hair by washing, then of its separation into what were called strands, or sections, the hair so separated, or the separated strands, being then placed upon hair curlers and clamped into position. As regards the "Jamal" system of hair-waving it is before the placing of the hair in the curlers that the lotion is applied, and it is a particular characteristic and an essential feature of the "Jamal" system that the "Jamal" lotion is applied to the hair at that stage. When the hair has been placed in the curlers heat is then applied to it. In some systems this is done by a machine, or by electrical devices, but in the case of "Jamal" hair-waving the heat is generated in these sachets or vapets placed upon and clamped into the curlers. The chemical contents of the sachet react to the application of either a saline solution or plain water and give off heat, which is, of course, communicated to the hair with which it is in contact. The result, after a proper interval of time, is that the hair is given a wave which, at any rate, has a degree of permanence.

The evidence which was called consisted, in the first place, of three highly reputable representatives of the trade concerned, namely, Mr. Earnshaw, the Secretary of the Hairdressers' Association, a Mrs. Moore, the President of the Ladies' Hairdressers' Association, and a Mr. Da Costa, himself a hairdresser and the author of books on the subject-matter of permanent hair-waving. It was quite plain from the evidence of those three witnesses that the formula or phrase "Jamal Hair-"Waving" had, to the trade (that is to say, to all persons concerned in hairdressing), a perfectly well understood and accepted significance. It meant a system of waving hair in which, essentially, the lotion and the vapets, were used as part of the process, and for the purpose (as regards the vapets) of providing at the appropriate stage the necessary heat. This was not contested by Mr. White, the principal witness for the defendants, and it was agreed by all the witnesses, including Mr. White, that if in answer to a request for "a Jamal hair-"wave" the operation was performed and in the course of it some other media than the lotion and the vapets were used for the purposes for which the lotion and the vapets were designed, that would be contrary to the proper practice in the trade, to put it no higher. [His Lordship then reviewed the evidence of two ladies sent by the plaintiffs with "trap-orders" for "Jamal" hair-waves, and continued :]

It appeared from the evidence that on two occasions when a "Jamal" hair-wave was asked for, a hair-wave was given which was not in accordance with proper trade or professional practice, in that sachets, either exclusively or substantially, were used, other than the plaintiff company's vapets.

Pascoe Hayward K.C. and *Donald McIntyre* for the plaintiffs. The evidence shows that there has been some deception. If a customer asks for a "Jamal" hair-wave and she is given a machineless wave without the special "Jamal" materials, i.e., the sachets and the lotion, she is deceived, and the plaintiffs are injured in their trade. It makes no difference whether the customer knows or does not know that there is any trade secret in the "Jamal" materials. "Passing off" is a particular case of a wider class of cases of deception, a form of misrepresentation and it may apply to a process supplied to a customer just as much as to the sale of an article : *Samuelson* v. *Producers Distributing Co.* (1). The plaintiffs have a valuable property in the name "Jamal" which they are entitled to have protected against deception. They have spent a large sum in advertising their process. The result of dismissing this action would be to encourage the hairdressing trade to give imitation "Jamal" hair-waves without using the special sachets and lotion supplied for the process. [*Havana Cigar & Tobacco Factories, Ld.* v. *Oddenino* (2) was also referred to.]

(1) [1932] 1 Ch. 201.

(2) [1923] 2 Ch. 243; [1924] 1 Ch. 179.

Harold Lightman for the defendants. The plaintiff seeks to establish a right of property unknown to the law; a monopoly in a process not protected by letters patent. The plaintiff has wholly failed to make out the case which he has pleaded—the only case I have to meet. The statement of claim alleges title to the word "Jamal" as a registered trade-mark for a process of hair-waving. There can be no trade-mark for a "process." *Aristoc, Ld.* v. *Rysta Ld.* (1). Trade Marks Act, 1938, s. 68.

The plaintiff is entitled to trade-mark in relation to goods only and cannot integrate the right to that mark with a process. This is not a contest between rival hairdressers or rival manufacturers, nor is it one between a manufacturer and a retailer; the defendant does not sell goods, but performs services to members of the public. The plaintiff does not deal with the public in any manner, and it is difficult to see what right in law has been infringed. If a manufacturer of some non-patented chemical gives a name which he widely advertises to a process which is not protected by patent and which he does not operate, but which involves the use of that chemical, he cannot complain if a member of the public asking for that named service is given the identical service using the identical chemical, even though not manufactured or marketed by the plaintiffs.

The decision in *Samuelson* v. *Producers Distributing Co., Ld.* (2) is irrelevant; in that case the plaintiff had a title to protect his dramatic copyright. The absence of any evidence from members of the public should be fatal to the claim. A passing off action cannot succeed without proof that members of the public are likely to be deceived. In *Havana Cigar & Tobacco Factories, Ld.* v. *Oddenino* (3) there was such evidence. It is true that Russell J. (as he then was) treated the evidence of trade witnesses as material on this point, but the trade evidence alone would have been insufficient. Here, in dealing with the rendering of a service the evidence of members of the public is even more essential. Members of the public who ask for "Jamal" hair-waves know and care nothing about the plaintiff or the goods it is marketing to the trade. If there are any exclusive rights in the chemicals these belong to Evans Chemicals, Ld., which is not a party to this action. In no view of the matter can the plaintiff be entitled to the injunction which is claimed.

(1) [1945] A. C. 68, 89.
(2) [1932] 1 Ch. 204.
(3) [1923] 2 Ch. 243; [1924] 1 Ch. 179.

Pascoe Hayward K.C. replied.

Jan. 28. EVERSHED J., after stating the facts. I have dealt at some length with the facts, because in a sharp divergence on matters of fact, in which I must choose between one witness and another, I feel it just and right that I should not be content merely to say summarily that I prefer one witness to another, but that I should give some of the grounds for my doing so, to which, of course, must be added my own observation of the demeanour of the witnesses in the witness box. The matter therefore stands thus, that assuming that there is any right in the plaintiff company when a member of the public (sometimes called a " discriminating woman ") asks for a " Jamal " hair-wave to have that wave performed exclusively with the material of the plaintiff company's marketing, if, as I say, there is such a right then it is established that on two occasions that right was infringed. That has given rise to the point which I have thought to be of some difficulty, and perhaps of some public interest, namely, the consideration of the nature of the right, if any, which a plaintiff such as this plaintiff has in a subject-matter of this kind.

The action is framed as a simple action for what is called " passing off " so closely following the more normal formulæ as to ask for an injunction, amongst other things, to restrain the defendants from passing off as " Jamal " hair-waves processes of hair-waving not of the plaintiff company's design or manufacture. I think Mr. Pascoe Hayward has readily conceded that that form of injunction, and that formulation of the cause of action, will not do, because (if for no other reason), quite clearly the plaintiff company are not designers or manufacturers of any process, nor, to my way of thinking, can it be said, apart from patented processes or secret processes, that a business or a person can say that it is or he is the proprietor of a process. Certainly it cannot be logically or intelligibly asserted in this case that the plaintiff company are the proprietors of a process. On the other hand, it is clear that if a business markets certain goods for use in a process or in rendering some service, and if the buyers of those goods, namely, other traders, are entitled when asked for the named process or service to use *any* material, then a great hardship and a great injustice may be done to the business marketing the product, who would have, ultimately, no means whatever of securing any sale for their products ; and it would seem indeed pitiable if in a proper case the arm of the law were too short to protect a reputable business which had expended capital and energy and labour in building up a reputation and a goodwill, only to be defeated by an inability to formulate any well recognized cause of action. In this connexion the question arises, and arises necessarily: To what extent is it necessary in such a case as the present, to lead evidence directly from members of the public? It has been laid down many times that in the case of a passing off action in respect of goods, in the ordinary way, it must be proved not only that the reputation alleged for the goods, or for the connexion between the goods and the plaintiff, is well known in the trade, but also that it is well known to the public; and where the subject-matter of the action is the sale of an article ultimately reaching the public, one can see well enough the necessity for establishing the requisite knowledge in the public.

Passing off, as has been said many times, is a form of misrepresentation—not, of course, necessarily fraudulent. On the other hand, it is plain also that passing off, properly so called, is not confined to cases of the sale of goods. A form of action which restrains a man from trading under a particular name is called "passing off," though the defendant trader is not selling goods. He may be trading under a name which causes the public to suppose that he is connected with some other business. The well-known case of *Harrods, Ld.* v. *R. Harrod, Ld.* (1) comes to mind as an example, and that was a case where the defendant, if my recollection is right, was attempting to carry on under the name of "Harrod" a banking business, and the plaintiffs, the well-known company in Knightsbridge, raised the objection that the public would suppose that the business that the defendant was proposing to carry on was, in some way, connected with their well established Knightsbridge business. Now here, as I have stated, the subject-matter with which I am dealing is the rendering of a service, namely, the permanent waving of the hair. The service therefore involves no sale of any article to any member of the public. The articles used are consumed in the process. An illustration which was discussed in the course of the argument was a system of cleaning either carpets or clothing. It would not be difficult to imagine a case in which a person or company might establish a high reputation in connexion with a system of cleaning (let us say) men's clothes. For that purpose

(1) (1923) 40 T. L. R. 195.; 41 R. P. C. 74.

the assumed trader would market certain articles, whether mechanical, chemical, or others, to be used in the cleaning process, and they would sell those articles to the cleaners. The member of the public, relying on the reputation that the original trader had obtained, would send his clothing to the cleaners to be cleaned according to the named process. The member of the public in such a case would not, and prima facie could not, know, and would not be concerned to know, the actual process to which the clothing was subjected; he would be content to rely upon the reputation which the name, which applied to the system of clothes cleaning, had obtained. There is some parallel between those two cases, and indeed it may be said that I am simply illustrating one obscure matter by another, equally obscure; but I instance that case because of a distinction, and it is a distinction which has troubled me somewhat: In the case of clothes cleaning, assuming that the reputation has been acquired, it is impossible to suppose that the member of the public could, by the phrase "I want my clothes X cleaned," understand anything other than a system or method of cleaning clothes.

Now, in this case I do not think such an assumption is quite so certain. To many the alternatives may seem absurd. To anyone, male or female, who has had the experience of having their hair permanently waved, it may be axiomatic that the "Jamal" (or the "Eugene") permanent wave refers to the method or system, and not to the particular style which is reproduced or illustrated in the photograph or advertisement. But I am not entirely clear that the court ought to assume that when a member of the public speaks of a "Jamal hair-wave," he or she is referring to the system and not to the particular style or configuration of the curls which is the end of the hair-waving operation; and, of course, if there is that doubt, then the problem of deception obviously becomes more debatable; and if there is a debatable point, then in accordance with more normal practice, prima facie, at any rate, if would be essential that some evidence of some members of the public should be given to prove that by "Jamal hair-waving" a particular system or method is understood, and not a particular style. Assuming, therefore, that that burden did lie upon the plaintiffs, have they discharged it? That is, of course, a matter of the proper inferences to be drawn from the evidence as given, and I confess that I have felt considerable doubt on this matter. In the view that I take, I am by no means certain that such evidence is necessary in a case of this character. But assuming that it is, on the whole, although I think it is exceedingly near the line, I have come to the conclusion that the court can and should in this case draw the necessary inference from the evidence, namely, that a member of the public asking for a " Jamal " hair-wave would mean, and intend to get, a wave performed by a particular method, and not merely a particular style of coiffure. I draw that inference first from the fact that the advertisement P. 5, as also the brochure D. 2, makes it plain to anybody who reads it that a "Jamal" hair-wave is a method and not a style. Further, Mr. Pascoe Hayward in his reply, has drawn my attention to the evidence given by the hairdressers. I think it is established that evidence by a retailer as to what members of the public ask for, and what inference is proper to be drawn from those requests, is properly admissible evidence. That I think emerges from the judgment of Lord Russell in *Havana Cigar & Tobacco Factories, Ld.* v. *Oddendino* (1), and was recently applied by myself in *Delavelle, Ld.* v. *Stanley* (2). Without elaborating it further, I think that if one reads, sensibly and reasonably, the evidence of the three persons to whom I have already alluded, about the requests made by the public, bearing in mind what is done when those requests are made, and that members of the public apparently are satisfied with that which is done, the inference seems to be that the public must be asking for what they get.

The matter was put perhaps most forcibly by Mrs. Moore, when she said this in the course of her evidence. The question was : " Supposing that a customer came into your salon and " asked for a ' Jamal ' wave, what would you do ?—(A.) I would " use absolutely everything appertaining to the ' Jamal ' " perm, because it would be the only way in which I could give " the result which she expected. If a client asks for something, it must be something she wants, and if you promise to " give a person a genuine article it is up to you as an honest " trader to give it to her." Then the only relevant question which was put to her in cross-examination was this : " (Q.) And you believe that customers should get what they " ask for ? "—One would say that that was a fairly harmless question, to which the answer was : " (A.) I believe that if they " ask for a thing and come into a shop for a thing, they should " get what they ask for."

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(1) [1923] 2 Ch. 243 ; [1924] 1 Ch. 179.

(2) (1946) 63 R. P. C. 103.

Now, as I say, putting the whole matter together, I think that on the whole the inference in this case may properly be drawn. I say so with some diffidence, because I am quite sure that in cases of this sort where it is necessary to prove public notoriety, apart from trade notoriety, some evidence from members of the public should be given; but I am comforted, at any rate, in making what I hope is not an unduly bold assumption, by the circumstance that Mr. White himself, as I read his evidence, really does not in the least controvert that proposition. I refer to the passage which I have already mentioned, where Mr. White said that on the assumption (which, of course, he did not admit) that Miss Bitten and Mrs. Wilson did not get "Jamal" vapets when they had their permanent waves, they did not get what they were asking for. It is true, as Mr. Lightman points out, that as these ladies were sent as spies into the enemy's land by the plaintiffs, they could not be called, strictly, members of the public; but I do not think that Mr. White would really desire any such distinction to be drawn between Miss Bitten and Mrs. Wilson as emissaries of the plaintiffs on the one hand, and his more general clientele on the other hand. I therefore conclude that there is sufficient, if it be necessary, to establish a degree of public notoriety, and certainly no evidence was given to suggest the contrary. But, as I indicated a short time ago, I am not wholly clear that in a case of a service of this kind, public notoriety comes into it. As I have said, the plaintiff company, the marketers of the articles to be used in performing the service or the process, deal, and deal only, with the trader, and the articles they sell are wholly consumed by the trader in the course of the operation for which the articles are designed, and are not resold to the public. In the instance that I have cited of clothes cleaning it may be wholly immaterial to establish any knowledge in the public mind of the actual mechanical or chemical devices used for the purpose. But, if that be so, the question arises what is the right, if any, which the plaintiffs have, and whether it is infringed. It would be far too wide, plaintly, to suggest merely that the plaintiffs have a goodwill or similar right in the name, so that any injury to the goodwill is a tortious act. Many ordinary acts of competition are designed to injure another man's goodwill, but in no possible sense could they be tortious. On the other hand, where a brand name or a fancy name is applied to some service or process in circumstances in which it is perfectly well understood by the trade that when that process is carried out it should be carried out only with the branded articles, then it seems to me that if a trader knowingly carries out what is supposed to be that process with other articles than the branded articles, he is doing something which is wrongful, and which should entitle the injured plaintiff to his remedy. I think it is, or may be, as Mr. Pascoe Hayward put it, a form of misrepresentation, which is analogous to a passing off action, in that the trader is purporting to give, in answer to a request to him, a particular named process, when to his knowledge he is not giving any such process at all. He is, in other words, misrepresenting the process he is giving as being that which is associated with the name and the goodwill of the plaintiffs, and in so doing he does injury to the plaintiffs.

I am inclined to think that the matter may also be put on a contractual basis. If it is shown that over a period of years there is a course of trading whereby a trader buys a particular article from one who is marketing it, for use in the course of a particular service or process, it may well be, I think, a term implied in the contract that when that process is asked for those goods and those goods only will be used, just as, conversely in this case, it was impliedly a contractual arrangement between the plaintiffs and the defendants that these proprietary articles should be used in the course of a hair-wave which went by another name, namely, "Le Jean." I need not, however, pursue that further, because the plaintiffs have not framed their pleading upon any such implied contract. They have, as I say, framed it as a passing off action. But it has to be conceded that the formulation in the pleadings is not, as I think, really in accordance with the rights which the plaintiffs could allege and should allege when they are properly analysed; and certainly the form of injunction sought in the first part of the prayer: "An injunction "to restrain the defendant company its directors servants and "agents from advertising or using in the course of their said "business a process of hair-waving not of the plaintiff company's design and manufacture as and for the said process of "the plaintiff company's," seems to me, if Mr. Pascoe Hayward will forgive the expression, to have no real relation whatever to the facts claimed. The prayer, however, does go on: "and "from using the word 'Jamal' in connexion with any process "of hair-waving other than the process of the plaintiff "company." That I think is more near to it, although, of course, it is not what the plaintiffs accuse the defendants of having done, or at least, the emphasis is not as it has turned out that it should be. On the other hand, as Mr. Pascoe Hayward justly points out, the material facts on which the whole action has rested are pleaded quite clearly in the particulars of para. 3, which consisted of certain affidavits filed on the motion. It is a somewhat unusual form of particulars, but they put quite plainly before the defendants the facts on which the plaintiffs were going to rely for alleging wrongful interference with the plaintiffs' rights, contractual or otherwise. I think, in trying to do justice between the two parties, it would be lamentable to be debarred from giving effect to what a judge felt that justice demanded simply by some aberration in the form of the pleading. If the facts are fairly put forward it is not the function of the pleading to formulate the result. That however, must not make one forget that the defendant is entitled, quite properly, to address himself to the case which is being made against him, and he is not bound to assume, if he tries to deal with the case made, that the judge will then re-make the plaintiff's case so as to subject him to injunctions or claims or penalties which were not provided for in any original pleading.

I have tried to bear all those matters in mind, and I have reached a conclusion as to what I am disposed to do in this case, which I hope, if I have been at all nearly right in coming to my conclusions of fact and otherwise, will do justice between the parties; I think that in all the circumstances, and having regard to the pleadings and other matters, this is not a case in which I ought to grant any injunction which would impose on the defendant company and its directors the severe criminal liability which an injunction would impose; but, on the other hand, I think it would be right if I made a declaration of what I conceive to be the rights which the plaintiffs are entitled to have protected and which the defendants must not infringe. I formulated the declaration, apparently to Mr. Pascoe Hayward's satisfaction, and I therefore repeat it, as follows: " The defendants are not entitled to give to a customer asking " for a ' Jamal ' hair-wave a permanent wave purporting to be " a ' Jamal ' hair-wave unless the defendants use exclusively " as the lotion and heating media for such process the plaintiffs' " products the ' Jamal ' lotion and vapets respectively." In making that declaration I think I shall do nothing surprising to Mr. White. As I have already indicated, I think he agrees

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that that is the substance of what he ought to do, and departure from it, to say the least, would be a grave dereliction of his professional duty; and I therefore hope, and venture to believe, that he will not, at any rate consciously, allow any such thing to happen again; but, in view of what has happened it would, I think, be right to give the plaintiffs liberty to apply for an injunction should it be discovered that Mr. White is again oblivious of the plaintiffs' rights and his professional duty.

I should add that although I have included the lotion in the declaration, because that is the substance of the evidence, there has been no evidence before the court from which the court could infer that on either of the two occasions of the treatment of Miss Bitten or Mrs. Wilson, or on any other occasion, a lotion other than "Jamal" lotion has, in fact, been used.

I do not propose, as I have said, to grant any injunction, but to give liberty to apply. I propose to award the sum of 40s. as damages, and to direct, in all the circumstances, that the defendants pay one-half of the plaintiff company's costs.

Solicitors: *Griffinhoofe & Brewster; S. Myers & Son.*

H. L. L.

Dicta of EVERSHED, J., at pp. 310, 311, *applied.* WHITESIDE *v.* WHITESIDE. [1949] 1 All E.R. 755.

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VAN DER LINDE *v.* VAN DER LINDE.

Settlement — Voluntary settlement — Mistake — Rectification — Extraneous advantage to settlor—Jurisdiction.

A settlor executed a deed of covenant with his sister that, in consideration of his love and affection for her, he would pay to her for her life "an annual sum of 400*l*." He was subsequently advised that the deed did not carry out his intention that she should receive an annuity of 400*l*. net, after income tax had been deducted. As he wished to be in a position to make a more advantageous return in respect of surtax, he commenced an action for rectification of the deed by the substitution of the words "such an annual sum as "shall after deduction of income tax at the standard rate for the "time being amount to 400*l*." for the words "an annual sum "of 400*l*.":—

Held, that, as the proposed rectification was not one which would benefit the parties, inter se, it being merely proved that, through a mistake, the intention of the settlor to obtain some benefit from the income tax provisions had not been set out in the deed of covenant, the court would not exercise its jurisdiction to rectify the deed, and the action failed.

Lister v. *Hodgson* (1867) L.R. 4 Eq. 30; and *Bonhote* v. *Henderson* [1895] 1 Ch. 742 referred to.

WITNESS ACTION.

On October 8, 1942, a settlor executed a deed of covenant between himself and a beneficiary (his sister) wherein it was recited that the settlor desired to make provision by way of annuity for the beneficiary and it was witnessed that he would, for the term of her natural life, pay to her " an annual sum of " 400*l.* " in manner therein mentioned. The beneficiary did not execute the deed. The intention of the settlor, in executing the deed, was to provide for the beneficiary an annuity amounting to 400*l.* net after deduction of income tax and he did so, in the belief that the deed was effective to provide an annuity of that amount. If this intention had been carried out, in the wording of the deed, it would have been advantageous to him as regards his liability to surtax. He was subsequently advised that the deed failed to carry out his intention and was only effective to provide an annuity of 400*l.* gross. On April 5, 1944, the settlor executed a deed of rectification, made between himself and the beneficiary, for the purpose of carrying out his intention, which had inadvertently not been set out in the deed of covenant, but he was advised that the deed of rectification, though effective between the parties, was not effective to place them in the same position for the purposes of taxation as if the deed of covenant had, in accordance with the intention of the settlor, originally been executed in such amended terms. He, therefore, commenced an action against the beneficiary, claiming rectification of the deed of covenant by the substitution of the words " such annual sum as shall after " deduction of income tax at the standard rate for the time " being amount to 400*l.*" for the words " an annual sum of " 400*l.*"

Sir Frank Soskice S.-G. and *J. H. Stamp* for the Crown (as amicus curiæ). In all cases of this kind it must be shown that the original parties had the same intention. However clear the intention was, a mere intention is not enough. It is necessary for the settlor to have communicated the intention to the beneficiary. The plaintiff is trying to contravene a principle of equity. He is asking the court to exercise its

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jurisdiction to rectify, where there is no trace of any intention having been communicated between the parties. He is merely trying to improve his own position. Where the settlor is seeking rectification, merely in order to improve his own position in respect of his surtax return, the court should be reluctant to exercise its jurisdiction.

Pennycuick for the plaintiff. The motive of the plaintiff is immaterial. The question is : " What legal right did he intend " to create ? " That is a question of fact. It is the only question, and the fact that he is introducing a legal obligation of benefit to himself, by a side wind, is immaterial. [He referred to *Lister* v. *Hodgson* (1) and *Bonhote* v. *Henderson* (2).] The jurisdiction is exercisable, if the court is satisfied as to the intention of the plaintiff. At the time when he executed the deed of covenant he had two alternative forms of covenant in mind, namely: (*a*) a covenant to pay such an amount as would, after deduction of tax, produce 400*l*., or (*b*) a covenant to pay 800*l*. a year in respect of this annuity. The question is wholly one of fact, namely, that the settlor intended to bind himself to pay annually a sum sufficient to produce the net sum of 400*l*.

Bowyer for the defendant.

EVERSHED J. The judgment, which I am about to deliver, is intended to be applicable to three actions which have come on together before me. The plaintiff in each action is Mr. Max Van der Linde, the defendants being in the first case his sister, Amelia Van der Linde, in the second case a Mrs. Dorothy Harzheim, and in the third case his sister, Sarah Van der Linde. The facts are parallel in all three cases and it will therefore be convenient to take the first of the three cases mentioned, that affecting the plaintiff's sister, Amelia. The case came on before me in November, 1945, when evidence was given and at the close of the evidence, the matter was adjourned, at my suggestion, because I thought that, having regard to the circumstances, notice of it should be given to the Crown in case they thought it proper to appear in court. On the restoration of the case, I have had the advantage of hearing argument on behalf of the Crown as amicus curiæ.

The circumstances are these : It appears that the plaintiff had for some time been making voluntary payments to his sister. They lived, I believe, at all material dates in the same house, but it is the fact that he made those allowances. They varied

(1) (1867) L. R. 4 Eq. 30, 34.

(2) [1895] 1 Ch. 742.

in amount but, according to the evidence, the figure which was present to his mind, at any rate at the material dates, was 400*l*. a year. At some time, shortly before the execution of the deed of covenant, dated October 8, 1942, which is the subject-matter of the present action, the plaintiff was told by his accountant and also by a friend that, if he were to execute a deed of covenant providing for the bounty he made to his sister, it would have for him the advantage that he could then claim a deduction in respect of the covenanted payments for certain purposes relating to his own income tax obligations. It is not unnatural that this suggestion appealed to him. This friend gave him a document which was a blank form of covenant and which the friend said would be appropriate for the purpose. It is, in fact, so far as relevant to the issue I have to try, in precisely the form which the covenant actually executed took, that is to say, it provides on the face of it for a covenant to pay a gross sum. With income tax at 10*s*. in the pound, if the figure 800*l*. had been inserted in the draft, it would have been a draft covenant for paying 800*l*. gross or 400*l*. net.

It appears further from the evidence that the accountant did state to the plaintiff that there was more than one way in which the deed could be formulated; but it is also, I think, clear that the accountant himself expressed no preference for one form as against another, and it is abundantly plain that the plaintiff himself never really apprehended the nature of the problem or the legal forms which were required to give effect to what was suggested. The plaintiff thereupon, armed with the friend's draft, called on his solicitor, who also gave evidence. The evidence shows that the solicitor was given the friend's draft and that instructions were given to the solicitor to draw up a covenant in favour of the sister on the lines of that draft and that the figure 400*l*. was mentioned. At this stage, because it is the vital point in my judgment, on matters of evidence, I refer to the transcript of the shorthand note. It appears from the plaintiff's answers that he handed this draft to the solicitor, but that he could not say whether he gave to the solicitor any instructions in terms about freedom from income tax, though he said: "I thought it was my intention "and I think he understood it was my intention." The solicitor himself, however, has no recollection of any instructions in relation to income tax one way or the other. The solicitor is of considerable experience and if the point had been made clear that Mr. Van der Linde intended that the effect of the document should be to provide by covenant 400*l.* a year net, it certainly would be surprising that the solicitor had failed to give effect to it.

However that may be, the form of covenant follows the friend's draft, in that it is a simple covenant for payment of 400*l.* a year gross, with a proviso for determining the obligation on the bankruptcy of the covenantee. It is a deed of covenant inter partes, executed, however, only by the plaintiff. Having regard to the form of the deed, it is plain that it disentitled, as between himself and the taxing authority, the plaintiff from claiming relief, or deduction from liability, on the footing of an obligation to pay, with income tax at 10*s.* in the pound, a gross sum of 800*l.* From the time that that circumstance was discovered, it was, of course, a simple matter to remedy the defect by means of some amendment of the original deed, or the execution of a new one, assuming always that there was no objection raised on the part of the covenantee. Inasmuch as the payments continued on the same irregular basis as hitherto, and from the circumstance that the defendant, represented by counsel, has taken an entirely negative attitude throughout the case, I assume that in point of fact the defendant probably never knew of the existence of the covenant. Certainly she was in no way affected as regards the benefaction she received on its coming into existence and therefore could throw no light whatever on the matter which has been litigated. But the execution of the amendment, or deed of rectification, has, of course, not had the effect of making the amendments retrospective so as to entitle the plaintiff, from the date of the execution of the original deed, October 8, 1942, to the tax relief which he sought.

On those facts it is said on behalf of the plaintiff that what he intended to effect has been proved, and proved clearly, to be an obligation to pay to his sister, such a sum as, after deduction of income tax at the standard rate, would leave a net figure of 400*l.* a year. He says that, if that is proved, it is immaterial that his motive for making this deed was a fiscal benefit to himself, but that it is proper for the court, exercising its equitable discretionary jurisdiction of rectification, to substitute in effect for the deed made on October 8, 1942, which at that time was never really the plaintiff's deed at all, another rectified deed which gives effect, and will give effect from its original date, to what the plaintiff intended.

It is said on behalf of the Crown that there is no desire to take advantage of a mistake, though it must also be borne in mind that, since the question is one of the tax obligation of one subject, anything like unregulated benevolence towards him would be at the expense of other subjects. The Crown also points out that, whether or not the discretion should in any case be exercised, it is quite plain that the rectification of documents is a remedy which these courts grant only on most careful consideration of the circumstances sought to justify the claim.

I need not cite the language which Mr. Pennycuick quoted from *Bonhote* v. *Henderson* (1), beyond saying that it is very plain that the court approaches the exercise of its discretion with great caution and more cautiously in the case of a voluntary settlement sought to be rectified than in the case of a contract inter partes. The Solicitor-General has gone further and suggested that in the case of a covenant of this nature, which is a benefaction nothing more nor less to the sister, there is no equity to reform, because so to do either would involve adding to an already perfect gift on the face of it, or would involve perfecting an imperfect gift, a proposition which conflicts with the principles recently formulated by Romer J. in *In re Fry* (2) that there is in these courts no equity to complete or perfect an incomplete or imperfect gift. Further it is said on the Crown's behalf that, where on the facts it is shown that there never was any obstacle as between the two parties to the deed to put right any mistake, it would not be a case in which on any view the court should exercise its discretion, more particularly where the object is on the plaintiff's part to obtain, so to speak, by a side wind an advantage which he could have obtained and which he only lost through the error which was made.

On the view that I take of it, it is not necessary, and I do not think, therefore, probably desirable, that I should express any concluded view on those propositions. As to the proposition that there is no jurisdiction to rectify a voluntary covenant such as this, because of the absence of any equity to perfect an imperfect gift, I must say that, at the moment, I do not feel wholly satisfied about it. Mr. Pennycuick in reply referred to a passage of Lord Romilly's in *Lister* v. *Hodgson* (3) which seems to indicate that it may be too widely stated. But in the case of such a deed, and all the more particularly when the object is to obtain by a side wind some advantage to the settlor

(1) [1895] 1 Ch. 742.

(2) [1946] Ch. 312.

(3) L. R. 4 Eq. 30.

without any regard to the apparent intention on the face of the deed and to the fact that the covenantee has never suffered any damage from what is said to have gone wrong, I am satisfied that the reminders one finds in the text books to approach matters with caution are to be particularly borne in mind. In my judgment the answer to the plaintiff's claim is that he fails in limine to prove to my satisfaction that he intended to effect by this document a covenant to pay such a sum as, after deduction of income tax, would leave 400*l.* a year to his sister.

From the recital of facts which I have given, it seems to me that all he has proved was that he intended to obtain some benefit from the income tax provisions, which he was told he would obtain by a document in a form which was precisely followed in the covenant which he executed. If that is true, then the mistake was, with tax rates as they were then, that the figure put in should have been 800*l.* and not 400*l.* But I find it impossible to reach a clear view as to what was his real intention, and if it be no more precise than this, namely, that he intended, by whatever formulation of words was appropriate or possible, to achieve the result that he could deduct in his surtax return the amount of the bounty that he paid to his sister, in so far as the document fails by proper formulation to achieve that result, I certainly do not feel disposed to exercise in the particular form suggested the remedy of rectification in this case. I think I need say no more about it.

In this case there seems to have been a slip, and it may be hard that the plaintiff should suffer from the effects of the slip ; but it is not a case in which he is being made to suffer and some other individual is receiving some advantage, so that as between two persons there is any unfairness. He could have received a certain advantage if he had technically followed a particular form and adopted a particular type of document which, in the artificiality of the days in which we live, would have enabled him to obtain a particular benefit. For a time he failed—two years ; and it is, I think, somewhat important that in this case, which is a claim to rectify a deed inter partes, there is no evidence that the defendant has any view to put before the court of the intention of the document. As I say, it emphasizes at least this, that the document on the face of it does not appear, as between the two parties to it, to have worked any injustice. In the circumstances, I am bound to come to the conclusion that the plaintiff has failed to prove his case and the action must be dismissed with costs. So far as the other two actions are concerned, the results are identical with the substitution of the name, and, therefore, those actions likewise fail.

Solicitors: *Last, Riches & Co.; W. J. Woodhouse & Co.; Solicitor of Inland Revenue.*

J. L. D.

In re A DEBTOR. *Ex parte* OFFICIAL RECEIVER *v.* UNITED AUTO & FINANCE CORPORATION. *In re* BAUGHAN. *Ex parte* OFFICIAL RECEIVER *v.* BENNETT.

ROMER J.

1947

Jan. 20; *Feb.* 8.

Bankruptcy—Surplus after payment of ordinary creditors in full—Statutory interest—Postponed claims—Moneylenders' excess interest—Marriage settlement—Claim of settlement trustee under void covenant to settle after acquired property—Priorities—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-ss.* 7 *and* 8; *s.* 42, *sub-s.* 2; *Moneylenders Act,* 1927 (18 & 19 *Geo.* 5, *c.* 21), *s.* 9, *sub-s.* (1).

By s. 33 of the Bankruptcy Act, 1914, the priority of payment of certain classes of debts is provided for and by sub-s. 7, subject to the provisions of the Act, all debts proved in the bankruptcy are to be paid pari passu. By sub-s. 8, if there is any surplus after payment of the foregoing debts it shall be applied in payment of interest from the date of the receiving order at the rate of four per cent. per annum on all debts proved in the bankruptcy.

In two bankruptcy cases the Official Receiver, as trustee, had a surplus in hand after payment to the creditors of 20*s.* in the £ on all debts for which they had proved. In one case moneylenders claimed sums for interest exceeding five per cent. postponed by s. 9, sub-s. 2, of the Moneylenders Act, 1927 in priority to interest under s. 33, sub-s. 8. In the other case the trustee of a marriage settlement claimed moneys payable under a covenant to settle after acquired property, which under s. 42, sub-s. 2 of the Bankruptcy Act had become void against the trustee in bankruptcy, subject to a right to claim for dividend which was postponed until all claims of other creditors for valuable consideration had been satisfied:—

Held, (1.) that the moneylenders were "creditors" for their excess interest, as a debt provable in bankruptcy, and though postponed to other debts, it took precedence over the payment of statutory interest under s. 33, sub-s. 8, but (2.) that the settlement trustee claiming under the avoided covenant was not a "creditor" whose proof the trustee in bankruptcy was bound to accept, but had a special right to a dividend after all the claims of the creditors for value had been satisfied, and therefore, such right was postponed to the creditors' claim to statutory interest.

In re Cumming & West [1929] 1 Ch. 534 followed.

APPLICATION and CASE STATED in bankruptcy.

The facts, as stated in the judgment were as follows. These two applications involved points of similarity, and it was considered convenient that they should be heard and argued together, and this was accordingly done.

On the first application the official receiver, as trustee of the property of the debtor, sought the directions of this court, pursuant to s. 79 of the Bankruptcy Act, 1914, in the circumstances set out in his report, dated August 28, 1946, as follows: "(1.) The receiving order was made on August 1, 1940, on a "creditor's petition, and the order of adjudication was made "on August 5, 1940. The official receiver remained trustee "of the estate. The debtor applied for his discharge on June 19 "1945, when it was granted subject to suspension for two "months. (2.) According to the statement of affairs the liabil-"ities to rank for dividend were estimated at 2,769*l.* 8*s.* 8*d.* "and the assets were estimated to produce 4,504*l.* (3.) At the "date of the release of the official receiver as trustee, namely, "on July 31, 1942, the only amount realized was 8*l.* 9*s.* 7*d.*, "which was absorbed in payment of fees and expenses. The "debtor's estimate included 4,500*l.* at which he valued his "equity in a reversionary interest. Nothing was realized "from this interest. (4.) On January 22, 1944, the debtor's "mother died, leaving him her sole next of kin. His interest "in the deceased's estate was claimed by the official receiver, "and between October, 1944 and January, 1945, sums totalling "5,196*l.* 18*s.* 0*d.* were received on account of this interest "(5.) Early in 1945, the official receiver caused notices to be "given of his intention to pay a dividend. Twenty-four "proofs were lodged for claims totalling 4,778*l.* 0*s.* 8*d.* Of this "sum 202*l.* 3*s.* 7*d.* was admitted as payable preferentially "and was paid. Twenty proofs of creditors other than money-"lenders were admitted to rank for dividend at sums totalling "2,460*l.* 16*s.* 7*d.* Four proofs by moneylenders were admitted "for sums totalling 2,014*l.* 18*s.* 11*d.* Of this sum the amount "admitted to rank for dividend with the other creditors was "1,434*l.* 11*s.* 7*d.*, making a total of 3,895*l.* 8*s.* 2*d.* The remain-"der, 580*l.* 7*s.* 4*d.*, was postponed pursuant to s. 9, sub-s. 1, "of the Moneylenders Act, 1927. (6.) On March 16, 1945, a "first dividend of 15*s.* in the pound was paid on proofs for "3,895*l.* 8*s.* 2*d.* (7.) Further sums were then received by the "official receiver from the realization of the deceased's estate "and at present the balance standing to credit of the estate is "1,692*l.* 11*s.* 11*d.* Of this sum about 1,000*l.* will be required "to pay the balance of 20*s.* in the pound on the proofs admitted "for dividend. (8.) It then falls to be considered how the "balance of approximately 692*l.* should be applied. The "possible claimants to this fund are (*a*) the four moneylenders "with their claims for postponed interest totalling 580*l.* 7*s.* 4*d.*, "and (*b*) the creditors who will have received 20*s.* in the pound "with their claims to statutory interest at four per cent. on the "amount of their debts from the date of the receiving order, "under s. 33, sub-s. 8, of the Bankruptcy Act, 1914. (9.) The "official receiver seeks the directions of the court as to which "of these two classes of creditors has priority in the distribution "of the said sum of 692*l.*" On November 4, 1946, an order was made appointing the United Auto & Finance Corporation, Ld. to represent the creditors who are moneylenders, and who had submitted proofs in respect of money lent, and appointing the Inland Revenue to represent the creditors other than moneylenders. These two classes of creditors were each represented by counsel when the case came before Romer J. The precise direction which the official receiver required, and which was argued before his Lordship was an order directing him to what person or persons he should pay the sum of 692*l.* then in his possession, being the surplus remaining in his hands after payment of 20*s.* in the pound on all debts other than debts which were postponed by reason of the provisions of s. 9, sub-s. 1 of the Moneylenders Act, 1927.

The second application came before this court by way of case stated; pursuant to s. 100, sub-s. 3, of the Bankruptcy Act, 1914, by the judge of the Oxford county court, sitting in bankruptcy. The case stated was as follows: "(1.) This "motion coming before me on January 6, 1947, I was requested "by all the parties to state the following special case for the "opinion of the High Court pursuant to s. 100, sub-s. 3, of the "Bankruptcy Act, 1914, and I consented to do so. (2.) I find "the following facts, as stated in the official receiver's report, "dated December 9, 1946, to be proved: (*a*) A receiving order "was made against the bankrupt on October 4, 1927, and she "was adjudged bankupt on the same day. By an order, "dated October 17, 1927, it was directed that her estate should "be administered in a summary manner and the official "receiver is the trustee of her property. The bankrupt died on "December 20, 1942, without having obtained her discharge. "(*b*) On the occasion of her marriage to James Baughan, the "bankrupt, then Marjorie Bennett, spinster, executed an ante-"nuptial settlement, dated November 5, 1908, of all money or "property to which she would become entitled on the death of "her father, Alfred Bennett, and of all money or property "which might thereafter be acquired by her. By the said "settlement all such property was conveyed to trustees to hold "on trust for the bankrupt until the said intended marriage and "after the said marriage on trust for the persons named in the "said settlement. By cl. 7 thereof the bankrupt covenanted "to assign to the trustees all property not thereinbefore settled "to which she might become entitled during coverture. The "said intended marriage was duly solemnized on November 6, "1908. (*c*) The bankrupt's father, the said Alfred Bennett, "died on January 7, 1918. By his will he bequeathed a "legacy of 2,000*l.* to his wife Mrs. Georgina Bennett for life "with remainder in equal shares to his three children, of whom "the bankrupt was one. (*d*) By an assignment, dated June 8, "1929, the official receiver sold the bankrupt's life interest "under the said settlement for the sum of 1,000*l.*, but the assign-"ment did not include any assets other than those set out in the "schedule thereto. With the said sum of 1,000*l.* and with other "available assets the official receiver paid a dividend of 20*s.* "in the pound to all creditors who had at that time proved their "debts. (*e*) On April 14, 1935, the said Mrs. Georgina Bennett "died and shortly afterwards the executors of the said Alfred "Bennett transferred to the trustees of the settlement War "Stock to the value of 706*l.* 0*s.* 6*d.*, being the bankrupt's share "of the said settled legacy of 2,000*l.* (*f*) Until May, 1940, the "settlement trustees paid dividends on the 706*l.* 0*s.* 6*d.* "War Stock to the bankrupt. The official receiver then for "the first time learned of the position and intervened, contend-"ing that the covenant to settle after-acquired property in the "settlement of November 5, 1908, was void against him by "reason of s. 42, sub-s. 2, of the Bankruptcy Act, 1914. The "respondent, Alfred Harvey Bennett, who is the surviving "settlement trustee, admitted the official receiver's claim and "on December 10, 1946, transferred the said War Stock to the "official receiver. (3.) The official receiver now proposes out "of this sum to pay 20*s.* in the pound on any new proofs which

" may be lodged and admitted and desires the directions of the " court as to how he should dispose of the residue of the said " sum. (4.) On December 9, 1946, the respondent, Alfred " Harvey Bennett submitted a proof pursuant to s. 42, sub-s. 2, " of the Bankruptcy Act, 1914. (5.) By an order made by this " court on December 11, 1946, it was ordered that the respon- " dents, Wallis & Steevens, Ld., be appointed to represent all " the creditors other than the said Alfred Harvey Bennett on " the trial of this motion. The question for the opinion of the " High Court is whether the official receiver should apply the " surplus of the said War Stock first in paying statutory interest " on the claims of all the creditors, with the exception of the " respondent Alfred Harvey Bennett, pursuant to s. 33, sub-s. 8, " of the Bankruptcy Act, 1914, and next in paying dividends to " the said Alfred Harvey Bennett as a postponed creditor " pursuant to s. 42, sub-s. 2, of the said Act, or whether on the " other hand he should first pay dividends to the said postponed " creditor and apply any surplus, after payment of 20*s.* in the " pound on his proof, in paying statutory interest to the " creditors who have proved." The respondent, Mr. A. H. Bennett, the surviving trustee of the debtor's marriage settlement, claimed that the fund available should be applied towards satisfying his claim as such trustee in priority to paying statutory interest on the claims of all the creditors for valuable consideration.

V. R. Aronson for the official receiver in both cases. There are in all six classes of postponed creditors, viz., under s. 36, 42, sub-s. 2, s. 63, sub-s. 1 and s. 66, sub-s. 1, of the Bankruptcy Act, 1914, and under s. 9, sub-s. 1, of the Moneylenders Act, 1927, and s. 3 of the Partnership Act, 1890. The question here is whether such postponed creditors or any of them, rank in priority to the claim of the ordinary creditors for statutory interest at four per cent. under s. 33, sub-s. 8, of the Bankruptcy Act.

For this purpose the classes of postponed creditors fall into two groups. In ss. 63 and 66 of the Bankruptcy Act and s. 9 of the Moneylenders Act, the postponement is "until all debts " proved in the estate have been paid in full," In ss. 36 and 42 of the Bankruptcy Act and s. 3, of the Partnership Act, 1890, the postponement is until " all claims of the other creditors " . . . . have been satisfied." This distinction points to an intention to put the former class in a more favourable position

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than the latter. That is supported by the fact that the moneylenders claim for postponed interest is a real debt which he is entitled to be paid : *In re a Debtor* (1). Whereas the settlement trustee claiming under s. 42, sub-s. 2, is not a " creditor " at all, since his claim is declared by the sub-section to be void and he is given a right to prove as a form of compensation *In re Cumming and West* (2) per Tomlin J. The only authority bearing on this point is *In re Howes* (3), but that case did not turn on the construction of a section, but on the common law rule of bankruptcy, that the partner of a bankrupt may not compete with his own creditors.

The official receiver does not support any of the claimants, but desires the directions of the court as to how he should dispose of the funds in his hands.

Ashe Lincoln for the United Auto & Finance Corporation, Ld., in the first case.

This defendant represents four moneylenders who have been repaid the amounts borrowed together with interest at the rate of five per cent. Their claims for interest considerably exceed that figure, but are postponed under s. 9, sub-s. 2, of the Moneylenders Act, 1927. But the debts for which they have proved include the full interest due, which has not been satisfied. It therefore ranks in priority to the ordinary creditors' claim to statutory interest under s. 33, sub-s. 8, of the Bankruptcy Act. It is a real debt for which the moneylender is a creditor. *In re A Debtor* (1), unlike the claim of the settlement trustee under an avoided covenant which is not a " debt " at all.

J. H. Stamp for Commissioners of Inland Revenue, representing ordinary creditors.

The order of ranking between the moneylender in respect of interest exceeding five per cent. and of the other creditors in respect of their interest at four per cent. under s. 33, sub-s. 8, of the Act, depends upon the meaning of the words " after all " the debts proved in the estate have been paid in full." It is submitted that this condition is not satisfied until they have been paid all the interest to which they are entitled under the Bankrupty Act including the statutory interest. The intention is that the moneylenders' excess interest should not at any point enter into competition with the ordinary creditors.

Harcourt Barrington for all creditors other than the settlement trustee, Bennett, in the second case.

(1) [1937] Ch. 181.
(2) [1929] 1 Ch. 534, 547.
(3) [1937] Ch. 181.

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In s. 33, sub-s. 8, the expression "all debts proved in the "bankruptcy" cannot include the "special right" which Tomlin J. said in *In re Cumming and West* (1) arose under s. 42, sub-s. 2: if the claimant under s. 42, sub-s. 2, is not properly described as a "creditor," his "special right" is not properly described as a "debt" in the bankruptcy.

Creditors are not "satisfied" until statutory interest is paid: *In re Howes* (2). Interest arising after the commencement of the bankruptcy is regarded as part of the original "debt": *Ex parte Reeve* (3).

In s. 33, sub-s. 8, the expression "foregoing debts" does not refer to "all debts" as used in s. 33, sub-s. 7, but has the same meaning as in s. 33, sub-s. 2 and 3, that is, it refers to the priority debts specified in s. 33, sub-s. 1. Therefore (irrespective of what the practice may be) it allows instalments of statutory interest to be paid on all debts before the capital has been fully paid off. It follows that a person who is postponed under s. 42, sub-s. 2, to the capital debts of the other creditors, cannot be paid anything until those other creditors have had their interest as well.

A. G. de Montmorency for the respondent Bennett, settlement trustee. A claim for dividend under Bankruptcy Act, 1914, s. 42, sub-s. 2, is a liability against the estate and a debt provable in bankruptcy within ss. 30, sub-s. 3 and 167 of the Act. The view of Tomlin J. in *In re Cumming and West* (4) that claimants under s. 42, sub-s. 2, are not creditors is obiter and should not be followed. The covenant under s. 42, sub-s. 2, is not void in so far as it enables persons entitled under the covenant to rely upon it to claim in the bankruptcy after all claims of other creditors have been satisfied. "Satisfied" means payment of 20s. in the pound. This was assumed arguendo in *In re Genese* (5). "Satisfied" is equivalent to payment in full. The discretion of the court to annul an adjudication under s. 29, sub-s. 1, after debts are "paid in full" may be exercised, according to the authorities, upon payment of 20s. in the pound. *In re Howes* (6) is not applicable. This case applied to the partner of a bankrupt the general principle that a debtor cannot compete with his own creditors. No such competition arises in a claim under s. 42, sub-s. 2. A claim under s. 42, sub-s. 2, is a "foregoing debt," under s. 33, sub-s. 8; and to construe

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(1) [1929] 1 Ch. 548.
(2) [1934] Ch. 49, 52.
(3) (1804) 9 Ves. 588, 590.
(4) [1929] 1 Ch. 534, 548.
(5) (1885) 16 Q. B. D. 700.
(6) [1937] Ch. 181.

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"satisfied" under s. 42, sub-s. 2, as meaning 20*s.* in the pound plus four per cent. interest is inconsistent with s. 33, sub-s. 8. The only way to reconcile s. 33, sub-s. 8, and s. 42, sub-s. 2, is to treat a claim under the latter as a debt provable after the other creditors have been paid 20*s.* in the pound and no more.

Barrington replied.

Cur. adv. vult.

Feb. 8. ROMER J., in a written judgment, having stated the facts, proceeded. The point in common between the two applications, as hereinbefore appears, is that in each case a conflict arises between postponed claims on the one hand and creditors claiming statutory interest on the other. The statutory provisions postponing the claims in question, however, are not the same and it is the difference in the language in which those provisions are respectively couched that prevents each of the two cases from being necessarily governed by a determination of the other.

The claim by the moneylenders, on the first application, to interest in excess of five per cent. on the principal due to them is subjected to postponement by s. 9, sub-s. 1, of the Moneylenders Act, 1927 (1). Analogous provisions are contained in sub-s. 1 of s. 66 of the Bankruptcy Act, 1914 (2). It is, I think, clear that the amount due to a moneylender for interest which his debtor agreed to pay in excess of five per cent. per annum on the loan is within the definition of "debts provable in bankruptcy" which is contained in s. 30, sub-s. 3, of the Bankruptcy Act, 1914. It is not in respect of proof but of the right to receive dividends that the claim to such excess interest is subordinated to the claims

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(1) Money-lenders Act, 1927, s. 9: "Where a debt due to a money-"lender in respect of a loan made "by him after the commencement "of this Act includes interest, that "interest shall, for the purposes "of the provisions of the Bank-"ruptcy Act, 1914, relating to the "presentation of a bankruptcy "petition, voting at meetings, "compositions and schemes of "arrangement, and dividend, be "calculated at a rate not exceed-"ing five per cent. per annum, "but nothing in the foregoing "provision shall prejudice the "right of the creditor to receive "out of the estate, after all the "debts proved in the estate have "be paid in full, any higher rate "of interest to which he may be "entitled. The provisions of this "subsection shall, in relation to "such a debt as aforesaid, have "effect in substitution for the pro-"visions of subsection (1) of section "66 of the Bankruptcy Act, 1914."

(2) Bankruptcy Act, 1914, s. 66, sub-s. 1: "Where a debt has been "proved, and the debt includes

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of other creditors. It follows from this that a moneylender can include in the global sum for which he proves the amount of the excess interest due to him at the date of the receiving order but he cannot get a dividend in respect of that amount until the debts which the other creditors have proved in the estate have been paid in full. The question then is whether the excess interest is subordinated further to the statutory interest which is payable upon the debts of the other creditors proved in the estate. The provision for statutory interest is to be found in s. 33. Sub-sections 1 to 4 of this section deal with preferential debts. Sub-section 5 enacts that s. 33 shall apply in the case of a deceased person who dies insolvent as if he were a bankrupt and as if the date of his death were substituted for the date of the receiving order. Sub-section 6 deals with the position of the joint and several estates of partners. Sub-sections 7 and 8 are respectively in the following terms (1). Sub-section 9 is, for present purposes, immaterial. It was suggested in argument that "the foregoing debts" referred to in sub-s. 8 do not relate to the debts mentioned in sub-s. 7 (videlicet "all debts proved "in the bankruptcy") but are referable to the preferential debts enumerated in sub-s. 1. I cannot accept this contention. Grammatically the words "foregoing debts" embrace all debts to which reference has been made in the earlier parts of the section and do not embrace some only to the exclusion of others. Moreover, the view contended for would lead to the curious result that statutory interest would be payable in respect of the ordinary debts before anything was paid in reduction of the debts themselves. I accordingly read the words "the foregoing debts" as including both the preferential debts referred to in sub-s. 1 of s. 33 and also the universality of debts referred to in sub-s. 7. The result of this is that no creditor is entitled to statutory interest until all debts (pre-

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"interest, or any pecuniary consideration in lieu of interest, "such interest or consideration "shall, for the purposes of dividend, be calculated at a rate not "exceeding five per cent. per "annum, without prejudice to the "right of a creditor to receive out "of the estate any higher rate of "interest to which he may be "entitled after all the debts "proved in the estate have been "paid in full."

(1) Bankruptcy Act, 1914, s. 33, sub-s. 7: "Subject to the provisions "of this Act, all debts proved in "the bankruptcy shall be paid "pari passu. Sub-s. 8. If there is "any surplus after payment of the "foregoing debts it shall be "applied in payment of interest "from the date of the receiving "order at the rate of 4*l.* per cent. "per annum on all debts proved "in the bankruptcy."

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ferential or ordinary) proved in the bankruptcy have been paid, and that must mean paid in full. Inasmuch as a moneylender's claim to excess interest is a "debt" and is "provable," it would seem to follow that if he in fact proves for it in the bankruptcy of his debtor then the amount of such claim becomes a "debt proved in the bankruptcy" and must be paid before any surplus becomes available for the payment of statutory interest.

Counsel, however, who argued the contrary view, said that s. 33 of the Bankruptcy Act, 1914, and s. 9 of the Moneylenders Act, 1927, do not stand alone and that there are other provisions of the bankruptcy legislation which also have to be considered on this question and that some guidance is also to be obtained from decided cases. These provisions and authorities conveniently lead to a consideration of the second application before me, to which they are mainly relevant. The postponement of the claim of Mr. A. H. Bennett, as trustee of Mrs. Baughan's marriage settlement, is due to the provisions of s. 42, sub-s. 2, of the Bankruptcy Act, 1914 (1).

For present purposes two points on this sub-section call for comment; firstly, the position and rights of a claimant whose claim is expressly declared to be void against the trustee in bankruptcy; and secondly, the postponement of a dividend until the claims therein mentioned of other creditors have been satisfied, in contrast to the postponement (already mentioned) of a dividend on excess interest until all the debts proved in the estate have been paid in full.

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(1) Bankruptcy Act, 1914, s. 42, sub-s. 2: "Any covenant or "contract made by any person "(hereinafter called the settlor) in "consideration of his or her "marriage, either for the future "payment of money for the benefit of the settlor's wife or husband "or children, or for the future "settlement on or for the settlor's "wife or husband or children, of "property, wherein the settlor had "not at the date of the marriage "any estate or interest, whether "vested or contingent, in possession or remainder, and not being "money or property in right of "the settlor's wife or husband, "shall, if the settlor is adjudged "bankrupt and the covenant or "contract has not been executed "at the date of the commencement of his bankruptcy, be void "against the trustee in bankruptcy, except so far as it enables "the persons entitled under the "covenant or contract to claim for "dividend in the settlor's bankruptcy under or in respect of the "covenant or contract, but any "such claim to dividend shall be "postponed until all claims of the "other creditors for valuable "consideration in money or "money's worth have been "satisfied."

The first of these points was considered by Tomlin J. (as he then was) in *In re Cumming and West* (1). The learned judge said: "It is to be remembered that s. 24, sub-s. 2, is framed "in a special way. It provides that the contract or covenant "shall be void against the trustee in bankruptcy except so far "as it enables the persons entitled under the covenant to claim "for dividend in the settlor's bankruptcy under or in respect of "the covenant. That is curious language. Presumably the "curious or unusual framework of the clause is due to the desire "of the legislature to produce a special result. The contract "is void against the trustee, but there is reserved out of the "voidness a right on the part of the persons entitled under that "contract to claim for dividend. It has been quite fairly and "properly admitted by Mr. Tindale Davis that, having regard "to the decision in *Ex parte Taylor*, (2) the trustee in bankruptcy "is entitled, on a claim made within s. 42, sub-s. 2, to reject "the proof, leaving, of course, the claimant free, when "all those creditors to whom he is postponed have been "satisfied, to return to the charge, if he finds that the circum-"stances of the case are such that he can thereby obtain some "advantage. The real explanation of these sections, and the "explanation which seems to me to make them consistent "throughout, is that 'creditors' there means the persons "entitled to prove; and that when there is a reference to "'separate creditors,' it means separate creditors, that is to "say, persons whose claims are not made void by s. 42, but "persons whose proofs the trustee is entitled to accept: and "in the same way 'joint creditors' means those creditors whose "proofs the trustee is bound to accept; and that persons who "claim under a contract made void against the trustee are not "creditors. They are persons having a special right—namely, "a right to a claim for dividend in the settlor's bankruptcy, "under or in respect of the contract, after all the claims of the "other creditors for valuable consideration have been satisfied. "If, as I think, that is the true meaning of these sections, the "result is that the claimants in this case do not stand to-day "as creditors; and their right to put in a proof, or their right "to insist on the acceptance of that proof by the trustee, must "depend upon all the creditors, that is to say, all the separate "and joint creditors, whose proofs the trustee is bound to accept "having been first satisfied." As I read the judgment, the position of a claimant such as Mr. Bennett in the present case

(1) [1929] 1 Ch. 534, 547.

(2) (1879) 12 Ch. D. 366.

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is that he is not a creditor whose proof the trustee in bankruptcy is bound to accept but he has the special right to which Tomlin J. referred, namely, the right to a dividend in the bankruptcy after all the claims of the creditors for value have been satisfied.

As to the provisions relating to payment of proved debts on the one hand and satisfaction of claims on the other I was referred, in addition to s. 66 of the Bankruptcy Act, 1914, and s. 9 of the Moneylenders Act, 1927, to the terms of ss. 36 and 63 of the Bankruptcy Act, 1914, and to s. 3 of the Partnership Act, 1890 (1). It will be observed that whereas the claims referred to in s. 9 of the Moneylenders Act, 1927, and in ss. 63 and 66 of the Bankruptcy Act, 1914, are postponed until the other debts have been paid, those dealt with by s. 36 and 42 of the Bankruptcy Act, 1914, and by

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(1) Bankruptcy Act, 1914, s. 36, sub-s. 1: "Where a married woman has been adjudged bankrupt, "her husband shall not be entitled "to claim any dividend as a creditor "in respect of any money or other "estate lent or entrusted by him "to his wife for the purposes of "her trade or business until all "claims of the other creditors of his "wife for valuable consideration "in money or money's worth have "been satisfied. Sub-s. 2. Where "the husband or a married woman "has been adjudged bankrupt, "any money or other estate of "such woman lent or entrusted "by her to her husband for the "purpose of any trade or business "carried on by him or otherwise, "shall be treated as assets of his "estate, and the wife shall not be "entitled to claim any dividend as "a creditor in respect of any such "money or other estate until all "claims of the other creditors of "her husband for valuable con"sideration in money or money's "worth have been satisfied."

Section 63, sub-s. 1: "Where one "partner of a firm is adjudged "bankrupt, a creditor to whom the "bankrupt is indebted jointly with "the other partners of the firm, or "any of them, shall not receive "any dividend out of the separate "property of the bankrupt until "all the separate creditors have "received the full amount of their "respective debts."

Partnership Act, 1890, s. 3: "In the event of any person to "whom money has been advanced "by way of loan upon such a "contract as is mentioned in the "last foregoing section, or of any "buyer of a goodwill in con"sideration of a share of the profits "of the business, being adjudged "a bankrupt, entering into an "arrangement to pay his credtiors "less than twenty shillings in the "pound, or dying in insolvent "circumstances, the lender of the "loan shall not be entitled to "recover anything in respect of "his loan, and the seller of the "goodwill shall not be entitled to "recover anything in respect of "the share of profits contracted "for, until the claims of the other "creditors of the borrower or "buyer for valuable consideration "in money or money's worth have "been satisfied."

s. 3 of the Partnership Act, 1890, are postponed until the claims of other creditors have been satisfied. This difference in phraseology may well be of some significance.

Clauson J. (as he then was) expressed his views as to what amounts to the "satisfaction" of a proving creditor in *In re Howes* (1). He there held that where the assets of a bankrupt are sufficient to satisfy in full the statutory interest on the amounts due to the separate and joint creditors respectively, but are not sufficient to pay, in addition thereto, the amount due to a partner of a debtor, the separate and joint creditors are, upon the proper construction of s. 33, sub-s. 8, of the Bankruptcy Act, 1914, entitled, in priority to the partner of the bankrupt, to be paid the statutory interest in full on their respective debts proved in the bankruptcy. In the course of his judgment the learned judge said this: "If the claim of "Sir Charles Cottier's executors"—Sir Charles Cottier was the partner of the testator—"for principal is postponed to "the claims of the separate and joint creditors for interest, "there is enough to pay to both separate and joint creditors "their interest at the statutory rate in full. The question is, "are the separate and joint creditors entitled to say that the "claim of the executors for principal is so postponed? The "executors contend that they are not so postponed and that "they are entitled to be paid their principal before either the "separate or joint creditors receive anything for interest. "That, in my view, is a claim which the executors of Cottier "are not entitled to make. If I were to allow that claim, I "should be enabling Cottier's executors to procure for the "benefit of his estate a diminution of the total amount which "would otherwise be payable out of Howes' estate to creditors "of Howes to whom Cottier is liable, and that seems to me to "be contrary to the principles of bankruptcy. It is suggested "that I can find something in s. 33 of the Bankruptcy Act, "1914, which, in some way, would assist me in holding in "favour of the claim of Cottier's executors. I cannot find it. "The principle appears to be well established by the older cases, "and the principle seems to be, that just as a debtor cannot "compete with his own creditors, so the partner of a debtor "cannot compete with any of the debtor's creditors, so long as "there are any creditors of that debtor not fully satisfied to whom "the claimant is under liability. Here there are joint creditors "not fully satisfied, for they are not fully satisfied until they

(1) [1934] Ch. 49.

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"have had not only their 20*s.*, but also the four per cent. "Accordingly, in my view the right course is that the separate "and joint creditors will receive their four per cent. in full, "upon the amounts of their respective debts for the time being "outstanding; and what remains after that will be available "to meet the claim of Sir Charles Cottier's executors."

It is clear that Clauson J. was entertaining and expressing the view that the separate and joint creditors could not be regarded as "satisfied" in respect of their debts until they received statutory interest on the amounts admitted to proof as well as the amounts themselves. A similar view appears to have been taken and applied by Lord Eldon L.C., in *Ex parte Reeve* (1), where it was held that under a joint commission of bankruptcy the right of the creditors to interest, subsequent to the date of the commission, in the case of a surplus should be preferred to a debt from the separate to the joint estate. The Lord Chancellor, after pointing out that the course in bankruptcy had been to stop the proof at the date of the commission, in as much as the debt to be proved was the debt due before the commission, said (2): "It is true, now a great deal of debt "accrued after the bankruptcy is paid under it; for instance, "all interest accrued, though after the date of the commission, "if the state of the effects allows it, upon a sort of equitable "principle, the interest being considered as a kind of adjunct "or shadow of the principal debt, which was due before the "bankruptcy . . . . if the principle is, that neither the "partnership nor the individual debtor shall claim in competition with the creditors, and if the creditors are entitled to any "interest, the interest is as much a debt as the capital; and "that principle will prevent either the partnership or the "individual debtor ranking with the other creditors, until all "their demand is satisfied; which includes both the principal "and interest of their debts." Although the last passage is somewhat ambiguous it is reasonably plain, I think, that the interest to which the Lord Chancellor was referring was the interest subsequent, and not previous, to the commission. *In re Howes* (3) and *Ex parte Reeve* (1) are not, of course, precisely relevant to present purposes, for both cases involved, and were decided upon the well-established principle as to partners which is stated in the judgments, and that principle is not in issue in the present case; but I have the guidance both of Lord Eldon and of Lord Clauson that a creditor is not "satisfied" until he has been paid not only his debt but subsequent interest as well. It is, moreover, to be observed that the "satisfaction" envisaged by s. 42, sub-s. 2, of the Bankruptcy Act, 1914, is not of proved debts but of "claims" which prima facie should receive a somewhat wider interpretation than the word "debts" in a statute in which both expressions are used. Reference was made in argument to *In re Genese* (1), as supporting the proposition that a claimant in the position of the respondent Bennett should only be postponed to the extent necessary to pay creditors for value 20s. in the pound on their debts and not further postponed to the claims of such creditors for statutory interest. The point, however, was not dealt with by Cave J., who decided the case and I cannot regard it as an authority in the sense contended for.

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(1) 9 Ves. 588.

(2) Ibid. 590.

(3) [1934] Ch. 49.

I have come accordingly to the following conclusions as to the position of Mr. Bennett as trustee of Mrs. Baughan's marriage settlement: (1.) That his claim against the bankrupt's estate is not a "debt" for the purpose of s. 33, sub-s. 7, of the Act; (2.) that, accordingly, it is not one of "the foregoing "debts" for the purpose of s. 33, sub-s. 8; (3.) that it merely confers the right to receive a dividend after all the claims of the creditors for valuable consideration have been satisfied; and (4.) that such claims cannot be regarded as "satisfied" until they have been paid in full with statutory interest. In my judgment, accordingly, the question asked by the special case in the matter of Mrs. Baughan should be answered by stating that the official receiver should apply the surplus of the War Stock therein mentioned first in paying statutory interest on the claims of all the creditors, with the exception of the respondent, Alfred Harvey Bennett, pursuant to s. 33, sub-s. 8, of the Bankruptcy Act, 1914, and next in paying dividends to the said Alfred Harvey Bennett as a postponed creditor pursuant to s. 42, sub-s. 2, of the said Act.

The conclusions at which I have arrived on the second application do not, however, necessarily dispose of the first. As I have said earlier in this judgment, excess interest due on a moneylenders' loan is a debt, and a provable debt. As was stated by the present Master of the Rolls in *In re A Debtor* (2), s. 9, sub-s. 1 of the Moneylenders Act, 1927, "does not destroy

(1) 16 Q. B. D. 700.

(2) [1937] Ch. 181, 188.

"the excess interest for the purpose of the bankruptcy law; "it leaves it as a real debt, provable in bankruptcy and payable "in bankruptcy but, for certain limited and specific purposes, "it is to be ignored or postponed." A claim to excess interest accordingly differs substantially in quality from a claim which is postponed under s. 42, sub-s. 2, of the Bankruptcy Act. In my judgment, a claim to excess interest is a debt within s. 33, sub-s. 7, and, accordingly, on the construction of this section, no surplus is available for the purposes of sub-s. 8, until this debt, together with the other debts, is paid in full. It is then said that assuming this to be the effect of s. 33 if taken alone, nevertheless a dividend is postponed by s. 9 of the Moneylenders Act, 1927, until all the debts proved in the bankruptcy have been paid in full and such debts include statutory interest which, it is said, grows out of them. It is true that interest subsequent to the date of the receiving order is, in the words of Lord Eldon in *Ex parte Reeve* (1) (supra) "a kind of adjunct "or shadow of the principal debt," but the question is whether it is part of "the debts proved in the estate" for the purpose of s. 9. In my judgment it is not. The phrase "debts proved "in the estate" includes the total amounts for which creditors have successfully proved. I am unable to see why its ordinary signification should be varied so as to make it include also something for which a creditor has not proved, and for which he could not prove, namely, statutory interest on his debt. Had Parliament intended the dividend on excess interest to be postponed to statutory interest it could either have said so in express terms or at least have assimilated it in treatment to such claims as those postponed by s. 42, sub-s. 2. As the legislature has done neither the one thing nor the other, I attribute to the phrase the same meaning as the words "debts proved in "the bankruptcy" bear in s. 33, sub-s. 8, of the Bankruptcy Act, 1914, and in which statutory interest is plainly not included. Nor, I think, do the other provisions of the bankruptcy legislation to which I have referred lead to a contrary conclusion. In my judgment, accordingly, a debt in respect of excess interest takes precedence over statutory interest by virtue of s. 33, sub-s. 8, of the Bankruptcy Act, 1914 and the dividend payable on such debt is not postponed to payment of statutory interest by reason of sub-s. 1 of s. 9 of the Moneylenders Act, 1927.

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(1) 9 Ves. 590.

On the first application, therefore, I will direct the official receiver to apply the balance of 692*l.* which is in question firstly in satisfying the claims of the four moneylenders for postponed interest, and, secondly, in or towards satisfying the claims of creditors to statutory interest under s. 33, sub-s. 8, of the Bankruptcy Act, 1914.

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A DEBTOR, *In re.* *Ex parte* OFFICIAL RECEIVER *v.* UNITED AUTO & FINANCE CORPORATION.

BAUGHAN, *In re.* *Ex parte* OFFICIAL RECEIVER *v.* BENNETT.

Solicitors: *Tarry, Sherlock & King; B. L. Harris & Co.; The Solicitor of Inland Revenue; Bird, Eldridge & Vinter.*

H. L. L.

In re MIDLETON'S SETTLEMENT.

COTTESLOE (LORD) AND LOYD *v.* ATTORNEY-GENERAL AND MIDLETON (EARL).

ROXBURGH J.

1947

Jan. 24, 28.

Revenue—Estate duty—Irish settlement—Sale of settled property—Investment in England of proceeds of sale—Settled Land Acts, 1882–1890 *in force in Ireland—Death of tenant for life—Claim by Estate Duty Office in England in respect of English investments—Refusal by Revenue Commissioners in Eire of relief from estate duty payable in Eire on English investments unless English claim upheld —Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *s.* 22, *sub-s.* 5—*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 2.

Some of the property comprised in an Irish settlement executed in 1909 was sold, part of the proceeds of sale being invested in English investments. On the death of the tenant for life in 1942 the English Estate Duty Office claimed estate duty in respect of the English investments and the Revenue Commissioners in Eire refused to give relief from the estate duty payable in Eire in respect of those investments unless the validity of the British claim was upheld by the British courts. On a summons by the trustees of the settlement to determine, inter alia, whether, on the death of the tenant for life, estate duty became leviable in England, under the Finance Act, 1894, on the English investments:—

Held, (1.) that the English investments were not "situate out "of the United Kingdom" within the meaning of those words as used in s. 2, sub-s. 2, of the Finance Act, 1894; (2.) that—the Settled Land Act, 1882, being in force in Eire—no English Act operated notionally to transpose them for purposes of estate

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duty (and that, even if the court had had to construe s. 22, sub-s. 5, of the Act of 1882, which it had not, that sub-section would not so have operated); (3.) that, accordingly, estate duty became leviable on them in England under the Finance Act, 1894.

In re Stoughton [1941] I. R. 166, considered.

In re Mackenzie [1941] Ch. 69, considered and applied.

ADJOURNED SUMMONS.

By a settlement, dated May 5, 1909, the Irish estates of F. (afterwards Earl of Midleton) were settled in strict settlement. After the date of the settlement and during the earl's lifetime certain lands comprised in the settlement were sold, some of the proceeds being invested in English investments, i.e., inscribed or registered stocks transferable in the books of the Bank of England or on registers kept in England. On February 13, 1942, the earl died domiciled in England. By letter, dated March 5, 1943, the English Estate Duty Office claimed estate duty in respect of the English investments. The trustees of the settlement did not contest the claim, but applied to the revenue commissioners in Eire for relief from the estate duty payable in Eire in respect of the English investments. By letter dated November 1, 1944, the revenue commissioners in Eire refused to give that relief unless the English courts upheld the validity of the English claim for estate duty. By this summons, which was taken out on June 15, 1946, the trustees of the settlement asked, inter alia, whether, on the death of the tenant for life, estate duty became leviable, under the Finance Act, 1894, on the English investments.

N. C. Armitage for the trustees.

J. H. Stamp for the Attorney-General. This is just an ordinary case of settled property in the United Kingdom. The investments in question are in the United Kingdom, and they constitute interests of beneficiaries and their successors in this country. On that state of facts, unless it can be shown that there is some principle of law which interferes and makes it otherwise, this is a "res ipsa loquitur" case, clearly coming within s. 1 of the Finance Act, 1894. It is precisely similar to *Cowley (Earl)* v. *Inland Revenue Commissioners* (1) and to many other cases in which estate duty has been levied, save for the fact that the investments in the present case are of the proceeds of sale of settled land in Ireland. The only question

(1) [1899] A. C. 198.

for determination is whether those investments are or are not estate in England for the purposes of the Finance Act, 1894. [He referred to s. 22, sub-s. 5, of the Settled Land Act, 1882, and to s. 2, sub-s. 2, of the Finance Act, 1894 (1).] The only "situation" that the Finance Act, 1894, recognizes is here or abroad. Investments situate here can be transferred abroad notionally only by an English Act capable of overriding the Finance Act, 1894: they cannot be so transferred by an Irish statute; and the Settled Land Act, 1882, is an Irish statute; see *In re Stoughton* (2). Accordingly, in the present case, duty is leviable in England on the English investments under the Finance Act, 1894.

Buckley for the tenant for life in possession. *In re Stoughton* (2) is an authority in favour of the tenant for life in possession, not of the Attorney-General. In that case Hanna J. held that the Settled Land Act, 1882, was an Irish Act, and that, by virtue of s. 22, sub-s. 5, of that Act and by virtue of the Irish Land Act, 1903, moneys which represented proceeds of sale of settled land in Ireland and which had been invested in England were notional Irish land. From that decision it is clear that the investments in the present case also are "notional Irish land" and that the court must hold that they are "situate out of the United Kingdom" and that duty is not payable on them under the Finance Act, 1894. [He referred to *In re Cartwright* (3) and *In re Cutcliffe's Will Trusts* (4).]

J. H. Stamp in reply. Nothing that happened in Ireland under Irish law can possibly affect the situation of investments registered in England. If the proceeds of sale of Irish land are brought over here and invested in the names of trustees, they cannot be treated as if they were taken out and put somewhere abroad. Morton J. had to deal with a question which, although it arose under different legislation, was rather of the same nature, in *In re Mackenzie* (1).

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(1) Settled Land Act, 1882, s. 22, sub-s. 5: "Capital money "arising under this Act while "remaining uninvested or un- "applied, and securities on which "an investment of any such "capital money is made, shall, for "all purposes of disposition, trans- "mission and devolution, be con- "sidered as land, and the same "shall be held for and go to the "same persons successively, in "the same manner and for and "on the same estates, interests, "and trusts, as the land where- "from the money arises would, if "not disposed of, have been held "and have gone under the settle- "ment."

Finance Act, 1894, s. 2, sub-s. 2: "Property passing on the death "of the deceased when situate "out of the United Kingdom shall "be included" [in "property "passing on the death of the "deceased" in sub-s. 1] "only if, "under the law in force before the "passing of this Act, legacy or "succession duty is payable in "respect thereof, or would be so "payable but for the relationship "of the person to whom it passes."

(2) [1941] I. R. 166.

(3) [1939] Ch. 90.

(4) [1940] Ch. 565.

ROXBURGH J. The short but important question which I have to decide is whether capital moneys invested in the United Kingdom and being the proceeds of sale of land in Ireland and arising under a strict settlement are "situate out of the United "Kingdom" within the meaning of s. 2, sub-s. 2, of the Finance Act, 1894, because they are capital moneys arising under a strict settlement of Irish land.

Looking at the section without regard to any other consideration, it is difficult to see how such investments could be said to be "situate out of the United Kingdom," because the plain fact is that they are not, and the Act does not say "situate or deemed to be situate" or anything of that kind; but, of course, there is the well-known provision with regard to capital moneys arising in such circumstances which I will read, for a reason which will appear presently, not from the Settled Land Act, 1925, but from s. 22, sub-s. 5, of the Settled Land Act, 1882. [His Lordship read the sub-section, and continued as follows:] A converse case to the present arose in Ireland and is the subject matter of *In re Stoughton* (2). In that case a testator died in England on December 6, 1885. By his will, dated November 6, 1868, he left all his lands in England, Wales and Ireland to trustees in trust for various persons. The headnote to the case states: "The domicile of the testator both at "the date of the will and at the date of his death was English; "the will was prepared by English solicitors and the trustees "and beneficiaries resided in England. Testator's wife died "on June 19, 1924, but some years prior to her death, she, "as tenant for life under the Settled Land Acts, sold the "land in Ireland under the Land Acts to the occupying tenants. "Portion of the proceeds of sale amounting to 36,076*l.* was "invested by the trustees in securities in England; the "balance was invested in land in England. On the death of "testator's nephew in 1936, the Revenue Commissioners "claimed that estate duty was payable on these securities."

For the most part that case turns on matters irrelevant to

(1) [1941] Ch. 69.

(2) [1941] I. R. 166.

what I have to decide, but undoubtedly one ground of the decision is relevant. Towards the end of his judgment Hanna J. first held that the Settled Land Act, 1882 was an Irish Act. He then read s. 22, sub-s. 5. He then read s. 16, sub-s. 1 (*d*) of the Irish Land Act, 1903, about which he said: "—the "provisions of s. 16, sub-s. 1 (*d*), secure that all claims as from "the date of the vesting order as against the land, shall attach "to the purchase money in like manner as immediately before "the date of the order they attached to the land. I am of "opinion that the effect of these sections is to give a complete "answer to the argument of the petitioners and to establish "not only that the English securities are notional Irish land "but that the claim of the Revenue Commissioners to have "the estate duty charged on the proceeds falls on them. The "succession of William Anthony Stoughton was, in my opinion, "a 'devolution' within the meaning of the words in s. 22, "sub-s. 5, of the Settled Land Act, 1882, under the will, and "also one of a series of successions made by the 'disposition' "thereunder. This brings the securities within one or other, "or both, of the words in s. 22, sub-s. 5, of the Settled Land Act. "These words cannot refer to the barest legal meaning to be "applied to the terms and would, in my opinion, carry with "them the legal incidents or obligations such as estate duty "attached thereto by statute or otherwise."

Mr. Buckley concedes that no English Settled Land Act can be applicable to the present case in present circumstances; but his argument is that I must have regard to the Irish settled land legislation, and that, having regard to that legislation and to this judgment, I must hold that, contrary to all appearances, the investments in question, which are in fact in England, are in the eye of the revenue law property situate outside the United Kingdom.

The ratio decidendi of *In re Stoughton* (1) causes me no little difficulty, but I think that I need not pursue that question further, because I feel bound to accept Mr. Stamp's submission in reply. Mr. Stamp's submission is that the meaning of s. 2, sub-s. 2, of the Finance Act, 1894, as applied to the present case is quite plain, and that I am not entitled to control that meaning by any statute which is not an English statute; and I cannot myself see the answer to that point.

Moreover, I have found assistance in a judgment of Morton J., as he then was, in *In re Mackenzie* (2). The legislation which

(1) [1941] I. R. 166. (2) [1941] Ch. 69.

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he had to consider was different; but in his judgment he said (1): "The property being situate in this country, I should "have had to find in some other Act"—and I think he means some other English Act—"clear words transposing notionally "its position to enable me to hold that it escaped the taxation "which is levied by s. 2 of the Finance Act of 1894."

In my judgment, in the present case, so far from there being any English Act which in clear words transposes notionally the position of these investments, there is no other English Act applicable at all; and even if, contrary to my judgment, and, I think, to Mr. Buckley's admission, I had to construe s. 22, sub-s. 5, of the Settled Land Act, 1882, I should have very great difficulty in holding that it, by clear words, transposes notionally the position of the investments for the purposes of estate duty. Accordingly, the claim of the Crown succeeds, and I hold that on the death of the tenant for life in 1942, estate duty became leviable in England, under the Finance Act, 1894, on the English investments.

Solicitors: *Warrens; Solicitor of Inland Revenue.*

(1) [1941] Ch. 72.

K. R. A. H.

EVERSHED J.

1947

Feb. 5, 6, 7.

ROBINSON *v.* THAMES MEAD PARK ESTATE, LIMITED.

Landlord and tenant—Agreement for lease—Clause containing covenant giving tenant option to continue tenancy under grant of building lease—Performance of covenants—Condition precedent—Validity of clause—Uncertainty.

By a memorandum of agreement, dated July 22, 1941, and entered into between a landlord and a tenant, it was agreed that the tenant should take a tenancy of a piece of land from July 22, 1941, until April 22, 1944. By cl. 2 the tenant covenanted to erect, during the first twelve months of the tenancy, a dwelling (which it was understood between the parties was to be of a temporary nature) on the land, with drainage to satisfy the by-laws of the local authority. Clause 19 contained a covenant by the landlord that "subject to the tenant having faithfully performed and "observed" all her agreements therein contained, she should have an option to continue the tenancy under a grant of a building lease, for a term of not less than sixty years and not more than ninety-nine years, at a ground rent of 10*l.* a year, from a date mutually agreed on, provided that the tenant should undertake to erect a private dwelling on the land. As a result of delay, due to various causes, the temporary house and drainage were not completed within the first year of the agreement, but the obligations of the tenant in those respects had been satisfied by April 19, 1944. The landlord having refused to grant the building lease, the tenant commenced an action for specific performance:—

Held, that it was sufficient for the purposes of cl. 19 of the agreement that the tenant, when she came to give her notice calling on the landlord to grant the lease, had then ended any previous breaches of covenants or failure to perform the covenants.

Held, also, that the rest of cl. 19 was not of so vague and uncertain a character as to be unenforceable, and that its language was sufficient to give certainty and to enable the court, in default of agreement between the parties, to fix what was reasonable, and, if necessary, to direct specific performance or its equivalent.

Bastin v. *Bidwell* (1881) 18 Ch. D. 238 distinguished.

ADJOURNED SUMMONS.

On July 22, 1941, a memorandum of agreement was entered into between Mrs. Rosina Lillian Robinson and Thames Mead Park Estate, Ld., by which it was agreed that she should take a tenancy of a piece of land at Shepperton within the jurisdiction of the Sunbury-on-Thames Urban District Council. The term of the tenancy commenced on July 22, 1941, and ended on April 22, 1944. The tenant, by cl. 2 thereof, covenanted " to use the land only as building land and to " erect thereon at her own expense during the first twelve " months of the term a private dwelling of a design and struc- " ture (on permanent foundations and with permanent " drainage) to satisfy the by-laws and regulations of the Sun- " bury-on-Thames Urban District Council." It was well understood by both parties to the agreement that this dwelling was to be a temporary structure of the character of a bungalow or dwelling-house.

Clause 3 provided that the tenant should " produce to the " landlord prior to the commencement of any building plans " of the proposed private dwelling with evidence that the afore- " said council (and any other authority concerned) have " approved such plans and have granted permission to her to " build and that (either before or immediately after erection) " the aforesaid council have licensed or will license the building " to be used for human habitation."

By cl. 19 the landlord agreed that " subject to the tenant " having faithfully performed and observed all her agreements " herein contained the tenant shall have the option of con-

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"tinuing the tenancy under the grant of a building lease for a "term of not less than sixty years and of not more than "ninety-nine years at a ground rent of 10*l*. a year from a date "mutually agreed upon (but which in any case shall be a date "not later than April 22, 1944) provided that the tenant shall "then undertake to erect before a date to be agreed upon a "private dwelling constructed wholly or in the main of bricks "concrete or stone with tiled or slated roof to plans approved "both by the local authority and the landlord of which the "estimated prime cost is not less than 450*l*. such prime cost "to be calculated to include the prime cost of any then existing drainage or foundations of brick or concrete which it may "then be agreed upon shall form part of the new building."

As a result of delay, due to protracted correspondence between the tenant and the local authority, the obligations relating to the drainage in connexion with the temporary house were not satisfied by the prescribed date. Those obligations had however, been satisfied, on April 19, 1944.

In July, 1945, the tenant, being unable to obtain a building lease of the property from the landlord in accordance with cl. 19 of the agreement, commenced an action, in which she sought a declaration that the defendant company was bound to grant her a ninety-nine years building lease of the land in accordance with the terms of that clause. The defendants denied that their refusal had been wrongful, alleging that the plaintiff had not erected a house within the first twelve months of the agreement to satisfy the by-laws of the local authority. They also contended that the provisions of cl. 19 were void and unenforceable by reason of uncertainty and alleged that if, contrary to their contention, those provisions were effective and binding on them, no date had been agreed between the parties for the commencement of the term thereby provided for, or for the erection of the private dwelling-house therein referred to.

Lindner for the plaintiff.
J. A. Wolfe for the defendants.

EVERSHED J. In this case, having regard to the line which counsel for the defendants has thought fit to take on their behalf, the matter has been resolved into a much smaller compass than at first seemed probable. [His Lordship then stated the facts, read cls. 2, 3 and 19 of the agreement, con-

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sidered the evidence, and continued :] In those circumstances, counsel for the defendants having confined the issue of fact to the issue as to the drains, the result is that on April 19, 1944, the obligation as to drains was satisfied. It is true that the terms of cl. 2 require all that to have been done not later than July 22, 1942. The question therefore arises, whether the delay in satisfying that is fatal to the plaintiff's rights. That question turns on the meaning to be given to the opening words of cl. 19 : "subject to the tenant having faithfully performed and "observed all her agreements herein contained." I agree that options of renewal contained in leases are normally construed as conditions, and strictly construed. Mr. Wolfe referred, by way of illustration, to *Bastin* v. *Bidwell* (1). It is, however, to be noted, in construing this particular document (and every document must be construed on its own merits) that this is not a case where the landlord grants a lease of his own house which he (the landlord) has erected, and grants the privilege to the tenant of renewal. In such a case, as Kay J. points out, the strict obligation is plainly justified because the landlord may reasonably say: "I want to be quite sure that you "are in all respects a scrupulous tenant before I grant you a "new tenancy." This is a case where the tenant was entering into obligations as to the erection of new premises, both during the first three years term and later ; and, I think in those circumstances, the problem which Kay J. found it unnecessary to decide in the case before him, I decide in the plaintiff's favour here, namely, that it is sufficient for the purpose of this cl. 19 that the tenant, when she comes to give her notice calling on the landlord to grant the lease, has then ended any previous breaches of covenants, or failure to perform covenants.

I construe the words "having faithfully performed and "observed" as meaning having, at the date when she gives the notice, faithfully performed and observed in the sense of having remedied any defects in any previous performance. I am not, as I say, concerned with anything except the drains ; and on the facts as I find them, the plaintiff had, on April 19, 1944, satisfied—albeit at a later date than was intended—her obligations in regard to the drains.

If that is so, the only question now remaining is, whether the rest of the clause is of so vague and uncertain a character as to be unenforceable, and whether to attempt to enforce it would be equivalent to the court making for the parties an agreement which they themselves have failed to do. It is, no doubt, true that if the parties express themselves in so uncertain and indefinite a way that the court cannot really say that they have agreed at all, then the court could not re-form the agreement and make one where the parties have not done so. But I think that I am not compelled to come to that negative conclusion. It seems to me that there is sufficient here to give certainty and to enable the court to direct if necessary specific performance or its equivalent. The first term is that the lease should be for a term of not less than sixty and not more than ninety-nine years. It is conceded that that is a matter where the tenant can choose within those limits; she has chosen ninety-nine years, and no question turns on that. The ground rent is fixed at 10*l.* a year, and the date of commencing again may be rendered certain, as Mr. Wolfe concedes; it is expressed thus: "from a date mutually agreed upon but "which in any case shall be a date not later than the 22nd day "of April, 1944," and in the circumstances it is quite plain that the commencing date is April 22, 1944.

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(1) (1881) 18 Ch. D. 238, 250, 253.

There then comes the most difficult question in the proviso, and I observe that this is the tenant's obligation which is, of course, fundamental to the whole lease: "Provided that "the tenant shall then undertake to erect before a date to be "agreed upon a private dwelling," etc., and there is no provision as to what is to happen if the parties fail to agree. It seems to me that in answering that question, it is material to see what follows. The dwelling is to be in accordance with "plans approved both by the local authority and the landlord." The same question might theoretically arise: Supposing the local authority, or supposing the landlord capriciously refused to approve any plans put forward. It appears to me that there is no doubt, in practice, that the court would decide that the landlord or the local authority cannot capriciously refuse altogether to approve any plan; and I think the same test must be applied as regards the liability to erect the house before a certain date—that neither party could factiously say that they would agree nothing. On the whole clause I think it is inherent throughout that what will happen in default of agreement is that the court will have to fix what is reasonable, and I think it therefore comes to this, that all these cases of agreement and approval of the plans are matters which must be decided, according to what would be reasonable, by the court, should agreement not be reached. To put it the other way round, in each case I think one can see that the obligation, so to speak, to suggest the date, or whatever it may be, is thrown on the one side or the other, and that the party to whom it is submitted cannot unreasonably withhold consent. It is no doubt true that prima facie it would be for the plaintiff to put forward a date, and it would then be for the landlord to say whether that was a proper date to which they were prepared to agree. However that may be, I reach the conclusion as a matter of construction that that is what this provision in the agreement means, and it gives it sufficient certainty to enable the court to enforce it.

It seems to me that the proper order to make is to declare that in the events which have happened, the plaintiff is now entitled to have, and the defendants are bound to grant to her, a building lease of ninety-nine years from April 22, 1944 at 10*l.* a year, of the premises, such lease to contain certain terms which I have indicated; and with liberty to either party to apply, in default of agreement, to settle the terms of the lease and generally. I do not understand that any question of damages has been raised, certainly no damages have been proved, and therefore none will be awarded.

Solicitors: *Saunders, Sobell, Greenbury & Leigh; Walker, Rowe & Clark.*

J. L. D.

WYNN-PARRY J.

1947

Feb. 25.

In re GOLDSMITH. BRETT *v.* BINGHAM.

*Will—Conditional devise subject to life interest—*800*l. to be paid by devisee within six months of testator's death to form part of settled residue—No express gift over—Time of the essence.*

A testator, who died in 1922, gave all his real and personal estate to his trustees upon trust to pay the net income therefrom to his wife during her life. He directed his trustees to hold his freehold house upon trust, after the death of his wife, for B. "but subject "to the payment of the sum of 800*l.* to my trustees within six "months of my decease to form part of my residuary estate." He gave the residue of his real and personal estate to H. absolutely. The testator's widow died in 1945. B. failed to comply with the condition to pay the 800*l.* during her life but he offered to pay that sum within six months of her death. The question was asked

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whether the devise was still operative and would take effect on payment of the 800*l.* by B:—

Held, that time was of the essence of the condition. Performance of the condition presently would not result in placing all the parties in the same position as if the terms of the will had been strictly complied with, for amongst such parties must be included the widow, as the tenant for life of residue, who was dead. The conditional devise had accordingly failed and the property had fallen into residue. *In re Packard* [1920] 1 Ch. 596, and *In re Goodwin* [1924] 2 Ch. 26, applied.

ADJOURNED SUMMONS.

The testator, Ephraim Thomas Goldsmith, by his will, dated September 5, 1922, after appointing the plaintiff Charles Edward Brett and the defendants James Hobden and Henry Bingham to be executors and trustees thereof, by cl. 2 bequeathed to his wife the sum of 1,000*l.* to be paid to her as soon as possible after his decease. By cl. 3 he gave, bequeathed and devised " all my real estate and the residue of my personal " estate as to freeholds and copyholds to the use of my trustees " in fee and as to personal estate unto my trustees absolutely " upon the following trusts: (*a*) to pay the net income thereof, " after payment of all rents rates taxes expenses of manage-" ment and such outgoings as in the opinion of my trustees " are properly chargeable to income, to my said wife during " her life." By cl. 3 (*b*) he directed his trustees, after her death, to pay out of his personal estate eight pecuniary legacies amounting in all to 700*l.* By cl. 3 (*d*) he provided as follows: " (*d*) As to my freehold house Seaforth with the garden and the " land (about twenty acres) used and occupied therewith upon " trust after the death of my said wife for the said Henry " Bingham in fee simple but subject to the payment by him of " the sum of 800*l.* to my trustees within six months of my " decease to form part of my residuary estate." By para. (*e*) he devised a cottage after the death of his wife to Edwin Leopold Message in fee simple, " subject to the payment by him of the sum " of 200*l.* to my trustees within six months of my decease to form " part of my residuary estate." Then, after dealing with other specific properties in paras. (*f*) and (*g*), by para. (*h*) he provided as follows: " And as to all the residue of my estate both real " and personal not otherwise hereinbefore disposed of upon " trust after the death of my said wife for the said James " Hobden absolutely subject to payment of all death duties and " other liabilities to which my estate may be subject with the "exception mentioned in cl. 4 hereof," and by cl. 4 he provided as follows: "I direct that all the gifts devises and legacies "contained in this my will are to be given and paid free of all "duties except the devise to Henry Bingham and the devise to "Edwin Leopold Message who are to be severally responsible "for the estate succession and other duties (if any) accruing "thereon respectively."

The testator died on November 6, 1922, and his widow died on December 7, 1945. The defendant, Henry Bingham, had not paid the sum of 800*l.*, within six months of the death of the testator's widow, but tendered it to his co-executors on March 5, 1946, who refused to accept it.

The first question raised by this summons was whether the conditional devise of "Seaforth" to the defendant Henry Bingham had failed and the property from and after the death of the said testator's widow has fallen into and formed part of the residuary estate and should be held in trust for the defendant James Hobden absolutely, subject to the condition as to the payment of death duties and other liabilities in cl. 4 of the will, or whether the devise was still operative and effective.

M. Berkeley for the plaintiff.

Myles for the first defendant, Henry Bingham. There is no express gift over of this property, if the 800*l.* is not paid within six months of the testator's death. The testator does not state his reasons for requiring the sum of 800*l.* to be paid. It may have been to provide a fund to enable the pecuniary legacies payable on the death of the widow to be discharged. Time here is not of the essence of the condition. The parties interested will be put in the same position as they would have been in had the condition been strictly performed if the devisee now pays the 800*l.* with interest. The case falls within the principle applied in *In re Packard* (1) and *In re Goodwin* (2). He also referred to *Paine* v. *Hyde* (3).

Belsham for the second defendant, James Hobden. While the widow was alive the devisee did not agree to pay her interest on the 800*l.* Payment now cannot put the parties in the same position as they would have been in if the condition had been strictly performed. Time is of the essence of this condition.

(1) [1920] 1 Ch. 596.
(2) [1924] 2 Ch. 26.
(3) (1841) 4 Beav. 468.

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WYNN-PARRY J. [after stating the material provisions of the will and the facts, continued :] The principle on which the court has to proceed in considering a gift of this nature, subject to a condition which has not been performed or strictly performed, is stated by Romer J. (as he then was) in his judgment in the case of *In re Goodwin* (1), where the learned judge says : " It is " well settled by authority that where a gift in a will is made " subject to a condition, even a condition precedent, to be " performed within a specified time, but the condition is not " in fact performed within that time, then, at any rate in the " absence of an express gift over, it is always a question for " the court to determine whether the time so specified was of " the essence of the matter." It will be observed that in the case of the will before me there is no express gift over. His Lordship then proceeds : " In determining that question the " court must have regard to what was presumably the intention " of the testator in inserting the condition, what it was that he " desired to bring about or to guard against ; and if the court " finds that a performance of the condition at a time subsequent " to the expiration of the period fixed by the testator in " substance provides for the very thing that the testator " intended to provide for, so that all parties can be put in " substantially the same position as they would have been in " had the condition been performed within the proper time, time " is not regarded as of the essence, and such performance is " treated as a sufficient compliance with the condition." In the case before Romer J. he had to consider the question that arose by reason of the failure by the widow of the testator, to whom he had bequeathed an annuity of 500*l.* per annum, to perform the condition on which that annuity was to succeed, namely, to discharge his estate from a liability which he had incurred by a previous covenant to pay her an annuity of 70*l.*, and as to that Romer J. said: " In the present case there " can, I think, be no doubt that the only object of the testator " in imposing the condition that the 70*l.* annuity should be " released was that the lady should not be paid both the " annuity and the 70*l.* a year," and later in the same paragraph he says : " An execution of a release by her at the present time " would, so far as the other parties are concerned, have " precisely the same effect as though she had executed the " release within the six months specified by the testator."

In an earlier case before Sargant J. (as he then was) of

(1) [1924] 2 Ch. 26, 30, 31.

In re Packard (1) which case was followed by Romer J. in *In re Goodwin* (2), Sargant J. having considered the decision of Lord Thurlow L.C. in *Taylor* v. *Popham* (3), said this: "But "the really important thing is, that the language of the Lord "Chancellor in *Taylor* v. *Popham* (3) is clearly not limited to "cases as to release from debts or payment of money, but "applies generally to the performance of a condition precedent "outside the time mentioned in the will but under such "circumstances that the parties can be placed in substantially "the same position as if the terms of the will had been strictly "complied with. It seems to me that there is nothing to show "that the direction that the settlement should be executed "within twelve months is more than a directory provision. "It is not of the essence or the substance of the condition; "and it is quite clear that all the parties interested can be "placed in precisely the same position as if the condition had "been literally and accurately complied with, because the "funds, which ought to have been settled within twelve months "of the death of the testator, have throughout been treated as "if they had been so settled, and they can be now settled in the "way required, so that there will be a continuous settlement "of the funds as from the death of the testator." I was also referred to the older case of *Paine* v. *Hyde* (4), but I think I can confine myself to the two more modern authorities to which I have already referred.

The question then arises: What is the effect of applying the principle that emerges from those two cases to the present case? Turning back to the judgment of Romer J. (as he then was) in *In re Goodwin* (2) the present case is, as I have pointed out a case in which there is no express gift over, and therefore it is a case in which the question arises for the court to determine whether the time specified in cl. 3 (*d*) of this will is of the essence of the matter. The next point to which I have to direct my mind is: What is to be presumed to have been the intention of the testator in making that condition, if any such intention can be extracted from a fair reading of the will? Mr. Myles, on behalf of the defendant Bingham, the devisee of the property "Seaforth," has very properly intimated that he is not in a position to address any argument to me to the effect that the reference to "within six months of my decease" should be read as a reference to six months from the decease of the widow.

(1) [1920] 1 Ch. 596, 603.

(2) [1924] 2 Ch. 26.

(3) (1782) 1 Bro. C. C. 168.

(4) 4 Beav. 468.

The evidence which has been read to me was, to a certain extent, directed towards an attempt to suggest that there had been a slip in the drafting of the will. With that I am not concerned. I have to consider the will as it stands, and it is plain beyond doubt on the language of this will that both in sub-cls. (*d*) and (*e*) the condition is the payment of the specified sum of money within six months of the decease of the testator. It does not appear to me to be a case in which it is so clear that the testator has made a slip in his will that, although I cannot take it into account for the purpose of construing a gift, yet I ought to hesitate to impute to him a particular intention, which can only be imputed to him on the basis of the language that he has in fact used, language which it is suggested is plainly indicative of what he intended. There is room for speculation either way, and therefore my duty is to take the will as it stands and ask myself on the basis of the language which the testator has used what presumably was his intention. I think, giving the matter the best consideration I can, that, having regard to the language of this will, it must be taken that the testator intended the 800*l.* mentioned in para. (*d*) and the 200*l.* mentioned in para. (*e*) to be paid within six months of his death for the purpose of bringing about what was the necessary consequence of those payments, namely, an increase in his residuary estate, which would have provided additional income for his widow during her life. It was suggested with some ingenuity by Mr. Myles, on behalf of the defendant Bingham, that the object really was to produce within six months of the death of the tenant for life a fund which would be sufficient to discharge the pecuniary legacies payable under cl. 3 (*b*) on the death of the widow. That was countered with at least equal ingenuity by Mr. Belsham on behalf of the residuary legatee, who pointed out that there was by cl. 2 of the will a bequest to the widow of a sum of 1,000*l.* which at least represented the total of the two sums of 800*l.* and 200*l.* referred to in paras. (*d*) and (*e*) of cl. 3. It is to be observed that the amount of the pecuniary legacies is less than the total of those two sums. With regard to the other argument, it will be observed that, whereas that total more than represents the amount of the pecuniary legacies, the direction in para. 2 is to pay the wife a certain sum as soon as possible after the decease of the testator.

I do not think I need choose between those two arguments, but I cannot disregard the consequence that the fulfilment of this condition would have meant the provision of a capital sum which, if invested, would produce income which would have been available to augment the amount payable to the widow during the rest of her life. It is therefore clear that a performance of the condition at this date cannot result in placing these parties in the same position as if the terms of the will had been strictly complied with, for within the phrase " the parties " must be included the life tenant, the widow, who is now dead. It therefore seems to me to follow that, taking the view of the will that I do, I cannot proceed on the basis of attributing no intention to the testator, but this is a case in which, applying the principle underlying the two cases of *In re Packard* (1) and *In re Goodwin* (2), I am not able to say that time is not of the essence. It therefore follows, in my view, that question 1 of the summons must be answered by declaring that, on the true construction of the will and, in the events which have happened, the conditional devise of the property in question has failed and the property has fallen into and forms part of the residuary estate of the testator.

Solicitors: *Shelton, Cobb & Co., for Coles & James, Eastbourne; Haslewood, Hare & Co., for Mayo & Perkins, Eastbourne; Kenneth Brown, Baker, Baker, for Andrews & Bennett, Burwash.*

(1) [1920] 1 Ch. 597, 603. (2) [1924] 2 Ch. 26, 30.

B. A. B.

In re TEMPLE.

Ex parte THE OFFICIAL RECEIVER *v.* THE OFFICIAL ASSIGNEE OF BOMBAY.

1947

Feb. 23; *Mar.* 10.

Romer and Roxburgh JJ.

Bankruptcy—After acquired property—English bankruptcy—Subsequent Indian bankruptcy—Whether after acquired property payable to Indian trustee.

The debtor was adjudicated bankrupt in 1927 in the Kingston county court and was undischarged. He was adjudicated insolvent in the High Court of Justice, Bombay, on August 25, 1942, the respondent, the Official Assignee in Bombay, being his trustee in the Indian insolvency. In 1943, on the death of his mother, the bankrupt became entitled to certain property under her will, and in

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1944 the sum of 1,969*l*., the proceeds of the sale of this property, was paid by the executors to the Official Receiver, the trustee in the English bankruptcy. The respondent claimed that this sum should be transferred to him as property acquired by the bankrupt since he was adjudicated bankrupt in India:—

Held, that in the absence of any enactment vesting after acquired property in the trustee of a subsequent foreign bankruptcy the property belonged to the English trustee and was divisible among the creditors in the English bankruptcy.

APPEAL from Kingston county court.

The debtor Lieutenant-Colonel R. D. Temple was adjudicated bankrupt on March 2, 1927, in Kingston county court. He had not obtained his discharge in that bankruptcy and his creditors in this country were still unsatisfied. On August 25, 1942, he was adjudicated insolvent in the High Court of Justice, Bombay, the respondent, the Official Assignee of Bombay, being appointed his trustee in that insolvency. On November 20, 1945, the bankrupt was discharged from the Indian insolvency.

On September 10, 1943, the bankrupt's mother died and he became entitled under her will to certain chattels and shares. In 1944 the net proceeds of sale of these assets, amounting to 1,969*l*. 15*s*. 1*d*., were paid by her executors to the appellant, the Official Receiver, as the trustee in bankruptcy under the English bankruptcy. He applied to the Kingston county court for directions as to how he should deal with this sum, asking (inter alia) whether it was divisible amongst the English creditors, or was to be transferred to the respondent, the Official Assignee of Bombay. The learned county court judge held that it was payable to the respondent. The Official Receiver appealed.

The main ground of the learned county court judge's decision was that an order dated April 21, 1933, of the registrar of that county court had determined the English bankruptcy. The court held that that order was made without jurisdiction, but the matter does not call for report.

Aronson for the appellant. Section 39 of the Bankruptcy Act, 1914, does not apply to foreign bankruptcies. It may be that if it were shown that there is under Indian law a provision similar to s. 39 of the Bankruptcy Act, 1914, vesting after-acquired property in the trustee in a subsequent insolvency, the court would have power to direct payment to the trustee in the Indian insolvency. [He referred to Williams on

Bankruptcy (15th ed. 246, 247), *In re Anderson* (1) and *In re Craig* (2).] There is, however, no similar provision under Indian law. Accordingly, the court should not direct payment to the Indian trustee.

C. E. Bagram for the respondent. Indian law has no provision similar to s. 39, but the Indian courts would apply a similar principle and after-acquired property would be paid to the trustees in a second insolvency. He referred to Dicey's Conflict of Laws (5th ed. p. 502, r. 125).

Aronson in reply referred to *In re Macfadyen & Co.* (3).

ROMER J. [After stating the facts and holding that the English bankruptcy had not been determined by the order of 1933, continued :] That does not, however, dispose of the case, because it is argued by Mr. Bagram that this asset, though prima facie an asset in the English bankruptcy, should nevertheless be transferred to the Official Assignee of Bombay, as property acquired by the bankrupt after his being adjudicated insolvent in India. Whether this be so or not depends to some extent on Indian law. The provision of the law in this country dealing with successive bankruptcies is s. 39, of the Bankruptcy Act, 1914, as amended by s. 3 of the Bankruptcy (Amendment) Act, 1926. It provides that, where there are successive bankruptcies, any property acquired by the bankrupt since he was last adjudged bankrupt shall vest in the trustee in the subsequent bankruptcy. That has been the law ever since the year 1913, when the Bankruptcy and Deeds of Arrangement Act, 1913, came into operation. It is said by Mr. Bagram that he cannot rely on that section itself, because by its terms it is only applicable to bankruptcies in this country. But, he says, the law of India would follow the law of this country in that respect and it would be right for the courts of this country to recognize the claim of the Official Assignee of Bombay to have these assets handed over to him in the same way as, in a second bankruptcy in this country, they would have been handed over to the trustee in the second bankruptcy. I should think the question whether the law of India does in fact follow the law of this country in that respect is open to some question on the evidence before us. At any rate, the onus is on Mr. Bagram's client to satisfy the court on that point, and he has failed to

(1) [1911] 1 K. B. 896.

(2) (1916) 86 L. J. (Ch.) 62.

(3) [1908] 1 K. B. 675.

discharge that onus. When the matter was before the learned county court judge, it does appear that some suggestion was made on behalf of the respondent about putting in evidence on the point, but the matter was arranged by counsel on the basis of some text-book which was read. That is not a course which we can adopt, if only for the reason that other parties, besides those before us, are interested in the case and they ought not to be bound by what might conceivably be an erroneous statement. But, even assuming that the law of India is the same as ours in this respect, and that the second trustee in an insolvency in India, in the case of two successive insolvencies, would be entitled to an asset such as the present, I am quite unable myself to see on what principle this court should direct the transmission to India of this fund, knowing, as it does, that there are English creditors in the first bankruptcy who are unsatisfied. It seems to me impossible to rest the argument on principles of equity, because it is not by reason of any principle of equity that property of a bankrupt who is subject to two successive bankruptcies, passes to the trustee in the second rather than to the trustee in the first. The equity, if any, was the other way, until the present rule was enacted in 1913. The rule, such as it is, is wholly statutory in this country and it is confined to bankruptcies in the United Kingdom. From that some inference might be drawn, I suppose, that it was not intended to extend to bankruptcies abroad, but, be that as it may, we have this position: that there is no English statute nor English rule of equity which would require the court to send this asset to be administered by the foreign trustee. I for my part, fail to see how it can be in accordance with any principle of equity, where you have a court still administering a fund for the benefit of unpaid creditors, to deprive them of an asset which falls to be administered here, in order that it may be administered by some other official for the benefit of somebody else. Mr. Bagram has failed to adduce any argument, satisfactory to my mind, that such a course ought to be adopted and has not produced any authority in support of it. Such authority as there is, in the somewhat limited discussion which has taken place on this point, has been brought to our notice and is to be found in Dicey's Conflict of Laws. It seems to point to the opposite conclusion, because in Dicey's Conflict of Laws the rule is laid down in r. 125 (5th ed. p. 502): "Where a debtor "has been made bankrupt in more countries than one, and,

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Romer J.

"under the bankruptcy law of each of such countries, there "has been an assignment of the bankrupt's property, which "might, under any of the foregoing rules, operate as an "assignment of his property in England, effect will be given "in England to that assignment which is earliest in date." For an assignment one has to look to r. 81 (5th ed., p. 368): "An assignment of a bankrupt's property to the "trustee in bankruptcy under the Bankruptcy Act, 1914 "(English bankruptcy), is, or operates as, an assignment of "the bankrupt's (1.) immovables (land), (2.) movables, "whether situate in England or elsewhere." It is suggested that that does not apply to property subsequently coming to the debtor, but is confined in its operation to property which the bankrupt had at the time of his adjudication. That, I think, is putting too narrow a construction on it, having regard to the fact that a trustee is entitled under the bankruptcy provisions of this country to the after-acquired property of the bankrupt. I see no reason to put the narrow interpretation on the rule which has been suggested. It is, I think, unnecessary to decide the point, because it seems to me the answer to Mr. Bagram's contention is that he has put forward no reason which is satisfactory, at least to my mind, in support of it. He can point to no rule of law in this country, no English statute, no principle of English equity, which would require the court to send this asset abroad, and, for want of any such satisfactory argument or reasoning, I do not propose to accept the contention. I would allow the appeal.

ROXBURGH J. I am in complete agreement on all points.

Appeal allowed.

Solicitors for both parties: *Tarry, Sherlock & King.*

B. A. B.

Applied. *In re* FLINN.
[1948] 1 Ch. 241

In re NORMAN.

ANDREW *v.* VINE AND OTHERS.

VAISEY J.

1947

Feb. 12, 19.

Will—Charity—Testatrix a member of and missionary belonging to "the "Brethren"—Bequest to "Editors of . . . . 'Echoes of Service' ". . . . to be applied . . . . for such objects as they may think fit" —"Echoes of Service" designation of a charity as well as title of a magazine—Editors trustees and treasurers of churches of "the "Brethren"—"For such objects"—Meaning—Validity of bequest.

VAISEY
J.

1947

NORMAN,
In re.
ANDREW
v.
VINE.

A testatrix by her will provided: "I request that the residue "of my moneys be bequeathed to the editors of the missionary "periodical called 'Echoes of Service' to be applied by them or "him (sic) for such objects as they may think fit." She was a member of "the Brethren," having for over fifty years been one of their missionaries. On a summons to determine, inter alia, whether the bequest constituted a valid gift to the editors beneficially or for charitable purposes, the evidence was that the editors were trustees and treasurers of the churches of "the Brethren" so far as regarded the missionary activities of "the Brethren"; that, as trustees and treasurers, they received and dispensed contributions for the missions of "the Brethren"; and that "Echoes of Service" was the title of a magazine and the accepted designation of a charity recognized by the Inland Revenue authorities:—

Held, that the bequest was for the use and benefit of the charity known as "Echoes of Service" and was a valid charitable bequest.

In re Delany [1902] 2 Ch. 642 and *In re Garrard* [1907] 1 Ch. 382 considered.

ADJOURNED SUMMONS.

A testatrix by her will dated September 23, 1931, provided, inter alia, "I request that the residue of my moneys be "bequeathed to the editors of the missionary periodical "called 'Echoes of Service' to be applied by them or him (sic) "for such objects as they may think fit." The testatrix was a member of "the Brethren" and had for over fifty years been one of their missionaries in China. On this summons taken out by her executrix to determine whether the bequest was a valid gift to the editors beneficially or for charitable purposes, or failed, and whether it comprised all or only some of certain specified items in her estate, the evidence was that the editors were trustees and treasurers of the churches of "the Brethren" so far as regarded the missionary activities of "the Brethren"; that, as trustees and treasurers, they received and dispensed contributions for the missions of "the Brethren"; that "Echoes of Service" was the name of a magazine and the accepted designation of a charity for distributing, through the editors, gifts sent and legacies bequeathed to them for the charitable objects of "the Brethren"; that the gifts were sent and the legacies bequeathed in furtherance of the charitable objects which the magazine represented; and that the Inland Revenue recognized "Echoes of Service" as a charity. The respondents to the summons were the editors, the next of kin and the Attorney-General.

The facts are fully stated in his Lordship's considered judgment.

F. B. Alcock for the executrix.

J. Neville Gray K.C. and *W. H. G. Cook* for the editors. This is a gift to the editors in their capacity as trustees. In Jarman on Wills, 7th ed., vol. 2, at p. 841, it is stated: "Where property is given to a person for such purposes as "he thinks fit, or to be disposed of as he thinks fit, or the like, "this is prima facie a beneficial gift. And even if the devisee "or legatee holds a public or official position, such a gift "does not necessarily give rise to the inference that he takes "as a trustee." *In re Freeman* (1) is an authority against the editors, *In re Barclay* (2) one in their favour; while *In re Garrard* (3) is a clear authority for the contention that they take as trustees of the charity and not in any other capacity. The words "such objects as they may think fit," may quite properly be construed to mean "such particular individuals "working for the charity as they may think fit." This case is very near the line: but, on the whole, it is reasonably plain, on the wording of the will, that this is a gift to these trustees as trustees of this particular mission. In the circumstances, the result would be exactly the same whether they took as individuals or as trustees. If the court is against the editors on the foregoing contention, then it is contended that this bequest has created an exclusively charitable trust.

Ungoed-Thomas for the next of kin. This is a gift to the editors for any objects which they may choose in their discretion, and that may include non-charitable objects. Strictly, it is quite correct to contend that charity and charitable objects do not enter into the matter at all. The evidence has not disclosed that the editors are charitable trustees. [He referred to *In re Delany* (4).] Where the trust is defined by the will, the court is not entitled to consider the nature of the trustees in order, if possible, by so doing to ascertain the nature of the trust: see *Farley* v. *Westminster Bank* (5); and the court will certainly not do so in the present case, for here the trust is not defined. [He referred also to

(1) [1908] 1 Ch. 720.
(2) [1929] 2 Ch. 173.
(3) [1907] 1 Ch. 382.
(4) [1902] 2 Ch. 642.
(5) [1939] A. C. 430, 437.

In re Friends' Free School (1) and *Dunne* v. *Byrne* (2).] In *In re Garrard* (3) where a gift to the vicar and churchwardens for the time being of Kington to be applied by them in such manner as they should in their sole discretion think fit was held to be a good charitable gift for ecclesiastical purposes in the parish, the object had been chosen, and the decision was reached on that footing. Where the object has been chosen, it is quite in order to specify the method of carrying it out. In the present case, however, the objects have still to be chosen—the choice being left to the editors—which makes the case fundamentally different from *In re Garrard* (3). Even if the editors could be regarded as an exclusively charitable entity—which it is contended they cannot be—a gift to them "for such objects as they may think fit" could not be held to be used in breach of trust if they used it for, e.g., a boys' club. For the editors to succeed on this summons, it must be established that the editors are an exclusively charitable entity and that the phrase "for such objects as they may "think fit" means "for such objects exclusively within their "purposes as they may think fit." On the true construction of the will and on the authorities that cannot be established and therefore the gift is not a good charitable gift and fails.

Danckwerts for the Attorney-General. This is a gift solely for charitable purposes and is good. The evidence is that "Echoes of Service" is a charity and is regarded as such by the Inland Revenue authorities: and the standards of the Inland Revenue authorities for the purposes of income tax are at least as strict as their standards for the purposes of a will. [He referred to *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (4).] "Echoes of Service" is a charitable purpose. The editors are recognized not by their individual names but by their office. In *In re Ray's Will Trusts* (5) the words were "I give all my property to the "person who, at the time of my death, shall be or shall act "as the abbess of the said convent, absolutely . . . ." There the word "absolutely" was used in much the same sense as the phrase "to be applied by them or him for such objects as "they may think fit" was used in the will in the present case.

Cur. adv. vult.

(1) [1907] 2 Ch. 675.
(2) [1912] A. C. 407.
(3) [1907] 1 Ch. 382.
(4) [1891] A. C. 531.
(5) [1936] Ch. 520.

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NORMAN, *In re.* ANDREW *v.* VINE.

Feb. 19. VAISEY J. read the following judgment. By her will, dated September 23, 1931, the testatrix, Ruth Norman, describing herself as a missionary in China, appointed her niece, the plaintiff, her executrix. After some legacies, including one of 50*l.* to Henrietta Dunphy, whom she calls her " dear fellow-worker in China," she in effect bequeathed what she designates as " the residue of her moneys " as follows: that is to say, " to the editors of the missionary periodical " called ' Echoes of Service ' to be applied by them or him (sic) " for such objects as they may think fit." It is these words which I have to construe.

The testatrix died at the Shanghai General Hospital in China on February 11, 1945, and her will was proved by the plaintiff on January 28, 1946. Her estate consisted of certain investments and moneys as to which the summons raises the question whether they are all of them " moneys " within the meaning of the will. With that question I can deal at once by saying that they are, regard being had to the use of the word " money " in a later part of the will, to which I need not further refer.

The first three defendants are the present editors of the periodical called " Echoes of Service " ; the other defendants are the testatrix' statutory next of kin, and the Attorney General.

Now it appears that the testatrix had for many years been a devoted member of the religious body of Evangelical Christians known as the Brethren. For over fifty years she had been engaged in missionary work in China. Missionaries, such as the testatrix, belonging to or associated with the Brethren, appear to be in some measure under the direction of the editors of " Echoes of Service " and to be financially supported by and through them. Indeed, the evidence shows that the editors are in reality trustees and treasurers of the churches of the Brethren, so far as regards their missionary activities. It is they who receive and dispense contributions for the missions of the Brethren, these amounting in 1945 to upwards of 74,000*l.* It further appears that " Echoes of Service " is not only the title of a magazine, but has also for many years been the accepted designation of a charity for (inter alia) distributing through its editors (usually at their discretion, sometimes for a specified purpose) gifts sent to them for the charitable objects of the Brethren. Such gifts are sent and legacies are bequeathed to them not for

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their personal benefit, nor even to carry on the publication of the magazine, but in furtherance of the missionary work represented by it.

I am told that " Echoes of Service " (in this wide sense) is recognized by the tax authorities as a charity. It is in evidence that during her fifty years (and more) of service the testatrix was in constant correspondence with the editors, and their predecessors in office, and was supported as a missionary by gifts sent to them (among others) on behalf of the churches of the Brethren, and though she had at the time of her death retired from active service, she was still maintained by funds at the editors' disposal.

Now I have to consider the meaning and effect of this will, and to decide between three possible alternatives :—(1.) that the bequest is a valid gift to the editors beneficially, or (2.) that it is a gift to them for the charitable purposes of (putting it shortly) " Echoes of Service," or (3.) that it fails for uncertainty. No case for any general charitable intention can be made out.

In two respects the case may be regarded as unusual. In the first place, the legatees, although called " editors " of a magazine, are in fact the trustees, treasurers and managers of a charity. Secondly, the case is not one in which a charity has been supported by a testatrix in her lifetime, but one in which she herself has been supported by the charity.

As regards the first point, if the bequest had been not to the editors of the periodical, but to the trustees, treasurers and managers of the charity going by the name of the periodical, I think the case would have been clearly distinguishable from such cases as *Dunne* v. *Byrne* (1) and *Farley* v. *Westminster Bank* (2), where the character or quality of the legatee has been held not to import a charitable intention into the terms of a gift. I think I am justified in the circumstances of this particular case in reading the bequest here as made to the trustees, treasurers and managers of the particular charity, and the reference to " objects " as merely indicating that the legacy was to be applied generally to the purposes of that charity and not (for example) exclusively to missionary activities in China. (See and compare *In re Delany* (3)).

The standard form of bequest which has for some years been recommended by the editors to benevolent testators (see the

(1) [1912] A. C. 407.
(2) [1939] A. C. 430.
(3) [1902] 2 Ch. 642.

exhibited "Echoes of Service" for June, 1946) names the editors as the appropriate legatees exactly as though they were trustees, treasurers or managers of the charity—as, in fact, I conceive that they are.

On the second point, I cannot doubt that the position and powers of the editors were well known to the testatrix, from whom communications were from time to time inserted in the magazine, and I am disposed to think that she may have regarded herself and her fellow-workers as "objects" within the meaning of that word as used in her will.

The audited account for 1945 shows that substantially the whole of the funds collected were expended on missionaries and missionary efforts in various parts of the world. In my judgment the case falls within the principle of *In re Garrard* (1), where Joyce J. held that a bequest to a vicar and churchwardens of a named parish to be applied by them in such manner as they should in their sole discretion think fit was a good charitable gift for ecclesiastical purposes in the parish, and I see no reason why I should in this case draw a distinction between two expressions so similar as "for such objects" and "in such manner." If I am wrong, it may be that the reference to objects, etc., is merely an indication of absolute ownership, with the result that the defendant editors take beneficially, and, were I so to hold, it would make no practical difference, since they offer to undertake to apply the funds for the purposes of their trust. But, in my view, that is not what the testatrix meant nor is it what she has said.

For the reasons which I have indicated, I do not accept the contention of the next-of-kin that this is a gift to the editors as individuals upon an undefined non-charitable trust resulting in an intestacy. I will declare, first, that the bequest is a valid gift to the defendant editors for the use and benefit of the charity or charitable organization known and designated as "Echoes of Service," and, secondly, that the moneys of which the residue is so bequeathed include all the items of property mentioned in paragraph 2 of the originating summons, and I order the costs of all parties to be taxed as between solicitor and client and raised and retained or paid out of the estate of the testatrix in due course of administration.

Solicitors: *Doyle, Devonshire & Co.; Stunt & Son; Treasury Solicitor.*

K. R. A. H.

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(1) [1907] 1 Ch. 382.

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Feb. 28; Mar. 3, 13.

In re CRAWSHAY, DECD.

HORE-RUTHVEN *v.* PUBLIC TRUSTEE (No. 2).

Power—Settled legacy—Exclusion of children of marriage from any share in legacy—Power to wife to appoint to nephews and nieces—Exercise of power by will in favour of nephew—Assignment by nephew in trust for children of marriage—Intention to benefit non-object—Fraud on power.

A testator who died in 1879, settled by his will, a legacy of 100,000*l.* on one of his daughters and her children with a gift over in default of issue to nephews and nieces as she should appoint and in default of appointment equally. By a codicil the testator reciting that his daughter intended to marry W. declared that if she did so any children of that marriage should be definitely excluded from any benefit or interest in the settled legacy. The daughter married W. and there were two children of the marriage both of whom attained twenty-one. She died in 1943 having made a will exercising the power in favour of one of her nephews J. The court held, on the construction of the will and codicil, that the gift over in default of issue meant issue to attain a vested interest and as she had no issue who attained a vested interest the gift over to the nephews and nieces took effect. [1946] Ch. 327. In 1887, the testator's three sons who were his residuary legatees executed a deed assigning all interest to which they might become entitled in the settled legacy, assuming it fell into residue, to trustees for the benefit of the daughter's children. In 1919, the nephew J., in compliance with a condition imposed on him by the will of one of his uncles assigned to the trustees of the deed of 1887, all interest vested or contingent to which he might become entitled in the settled legacy under the will of the first testator or the exercise of any power of appointment therein contained. There was no bargain or agreement between the parties, but there was clear evidence that the testator's daughter, acting upon legal advice and knowing or believing that her nephew J. intended to benefit her children, made the appointment to him not for his benefit, but with the sole object of benefiting her own children:—

Held, that the appointment was invalid as a fraud on the power, and that the settled fund passed in default of appointment to J., another nephew and two nieces of the daughter in equal shares.

In re Wright [1920] 1 Ch. 108 followed and applied.

ADJOURNED SUMMONS.

This was the further hearing of a summons taken out to determine questions arising under the will and first codicil thereto of Robert Thompson Crawshay, who died on May 10, 1879. The summons first came on for hearing on July 5, 1946, when the court decided a question of construction, and held that a legacy settled by the will of the deceased passed on the death of his daughter Mrs. Rose Williams to her nephews and nieces, and did not fall into residue. The case is reported [1946] Ch. 327, where the facts and the material documents are fully stated. The question whether an appointment made by the will of Mrs. Williams in favour of her nephew Jack Crawshay was or was not a fraud on the power was then adjourned and now came on for argument. The evidence contained in correspondence is fully set out in the judgment of the learned judge.

A. H. Droop for the plaintiffs.

L. F. Mumford for the Public Trustee and the defendants Eliot Crawshay-Williams and George Bransby Williams.

Neville Gray K.C. and *Ungoed-Thomas* for the personal representatives of Leslie Crawshay-Williams.

The appointor made this appointment trusting to the honour of the appointee to see justice done to her sons. This is not sufficient to invalidate the appointment : *Vatcher* v. *Paull* (1) per Lord Parker. It is impossible to say that the appointor had no benefit for her children in mind. But the cases where the appointor has made a bargain and is bound to appoint are distinguishable from those where, as here, he has not done so. Some of the propositions in the authorities are too widely stated : See Farwell on Powers, 3rd ed., pp. 457, 471, Withers on Reversions, 2nd ed., at p. 84.

G. A. Rink for the defendant Jack Crawshay. The present is an entirely different case from that of *In re Marsden* (2), as here the appointment was made to a child in the hope that when he grew up he would assist the appointor's children ; he cannot be said to be a passive instrument in the hands of the appointor.

There is no objection in law in the appointment of the fund to an object of the power, who has already assigned or endeavoured to assign his interest in it. He referred to *In re Wright* (3).

Geoffrey Cross for the defendant Mrs. Spiller. The appointment is invalid as a fraud on the power, and the parties entitled in default of appointment have a vested interest in the fund. An appointor cannot exercise his power with the intention of benefiting any person not an object of the

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(1) [1915] A. C. 372, 378.

(2) (1859) 4 Drew. 594.

(3) [1920] 1 Ch. 108.

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power. Mrs. Williams' letter of January 8, 1910, which is clearly admissible in evidence shows that her real intention was to benefit her own children whom she regarded as unjustly deprived of their inheritance. If she knew that Jack Crawshay intended to benefit her children out of any property appointed to him, the appointment is a fraud on the power. The legal situation was a very complicated one, and she was advised that it was necessary to make the appointment in each will she made in order to safeguard her children's interest. He referred to *Topham* v. *Duke of Portland* (1).

Cur. adv. vult.

Mar. 13. VAISEY J: I have already decided, as reported in the Law Reports (2), that the funds representing the legacy of 100,000*l.* Consols settled by the will of Robert Thompson Crawshay the elder (I will now refer to him as the first testator), who died on May 10, 1879, upon his daughter Rose (afterwards Mrs. Williams) for life did not at her death fall into the first testator's residue. That is to say, I held that those funds became subject to the trusts declared by such will to take effect upon failure of the trusts thereby declared in favour of her issue (not being issue of her marriage to Mr. Williams), videlicet upon such trusts for the benefit of all or any of the children who might be living at the time of her death of her brothers and sisters and in such proportions and subject to such conditions and provisions as she, Mrs. Williams, should by will appoint; but, in the event of her not exercising such power, then equally between all such children of her brothers and sisters as should be living at her decease. Mrs. Williams by her will dated June 13, 1934, exercised, or purported to exercise, the before-mentioned power by appointing the whole of the funds to her nephew, the defendant Jack Wiliam Leslie Crawshay (whom I will call Mr. Jack Crawshay), a son of one of her brothers. She died on September 16, 1943, and her will was proved on May 12, 1944. At the time of her death only four of her nephews and nieces were living and, accordingly, were objects of the power, namely, Mr. Jack Crawshay himself, the plaintiff Roger Oakes Crawshay and the defendant Mrs. Greener, son and daughter of another of her brothers, and the defendant Mrs. Spiller, a daughter of her sister. Consequently, if the appointment is valid, and that is the question which I have to decide, the whole of the funds go to Mr. Jack Crawshay; if it is not valid, they are divisible in equal fourth shares between himself and the three other persons whom I have named.

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(1) (1864) 11 H. L. C. 32.

(2) [1946] Ch. 327.

The exact circumstances in which it is alleged that the appointment was fraudulent must be presently narrated, but the underlying fact undoubtedly is and has been the resentment naturally felt by Mrs. Williams against the provision in a codicil to the will of her father, the first testator, excluding her issue by Mr. Williams from taking any benefit under that will. It is clear that other members of the family sympathized with and shared that resentment and that she and they regarded such exclusion as an injustice which deserved or required to be remedied. That object would have been completely and satisfactorily achieved if my decision on the point of construction had been the other way, for by a deed dated June 23, 1887, which I will call the 1887 deed, Mrs. Williams' three brothers, who were together absolutely entitled to the first testator's residue, assigned to the then trustees of the first testator's will all the share or shares to which as such residuary legatees they then were or they or their representatives might thereafter become entitled expectant on the death of their sister, Mrs. Williams, in the said settled legacy or the funds representing the same upon trusts for the benefit of the issue of Mr. and Mrs. Williams which it is unnecessary to state more particularly. The execution of the 1887 deed was the first step in what I may call, I hope not unfairly, a family conspiracy or scheme to defeat the express wishes of the first testator and to redress the grievance occasioned by the discrimination made against the children and other issue of Mr. and Mrs. Williams, a discretion which applied also to the trusts of another fund settled by his will, a fact to which I refer merely to emphasize the great care which the fisrt testator took to exclude such issue from any kind of participation in any part of his estate. Let me say at once that the conspiracy was meritorious enough and in no way exceptionable so far as it was or could be implemented by the conspirators out of and by means of their own property. But the difficulty of making a proper use of any special, that is any fiduciary, power of appointment to further or bring about any such end or purpose is at once apparent.

The next matter to be mentioned is the will of William

Thompson Crawshay, one of those three brothers of Mrs. Williams who have been already referred to. I will call him the second testator. His will is dated July 11, 1907, and by cl. 10 he devised certain real estates to the following uses (so far as material) that is to say to the use of trustees for a term of 1,000 years to commence from his death and subject thereto and to certain intermediate uses all of which have, as I understand, failed or determined, to the use of Mr. Jack Crawshay in fee simple. By cl. 13 of the said will the trusts of the said term of 1,000 years were declared. These included a trust that if the 1887 deed should for any reason fail to take effect (as in fact having regard to my decision on the construction it has) the trustees should immediately after the death of the survivor of the persons therein named, that is to say (in the events which happened) of Mrs. Williams herself, raise by mortgage of the said premises or any part thereof such a sum as should be equivalent to the value at such death of the investments representing the said settled legacy, less such share or interest therein as should have been previously assigned to the trustees of the 1887 deed by Mr. Jack Crawshay pursuant to the provisions thereinafter contained with interest from the death of Mrs. Williams as therein mentioned and should stand possessed of the said sum and interest upon the trusts which would have been subsisting under the 1887 deed with respect to the said funds if the 1887 deed had taken effect. And by cl. 15 of his will the second testator in effect and so far as material declared that Mr. Jack Crawshay should within six calendar months from his coming of age or the second testator's subsequent death assign to the satisfaction of the trustees of such will any share or interest to which he might be or become entitled in the said settled legacy under the will of the first testator or the exercise of any power of appointment therein contained to the trustees of the 1887 deed upon the trusts of the 1887 deed as though the same were effectual, with a further provision that in case Mr. Jack Crawshay should refuse or neglect to execute such assignment his estate in the devised premises should determine and become void. The second testator died on September 25, 1918, and his will with certain codicils thereto was proved on February 18, 1919. Mr. Jack Crawshay was born on September 10, 1894, and, therefore, attained his majority on September 9, 1915. By a deed dated February 3, 1919, that is, within the prescribed period of six months after the death of the second testator, and made between Mr. Jack Crawshay of the first part, the trustees of the second testator's will of the second part and the trustees of the 1887 deed of the third part, Mr. Jack Crawshay assigned to the parties thereto of the third part all the share or interest whether vested or contingent to which he then was or might thereafter become entitled of and in the said settled legacy and investments under the first testator's will or the exercise of any power of appointment therein contained upon the trusts and subject to the powers and provisions which under the 1887 deed or any exercise of any powers therein contained would then be subsisting or capable of taking effect with respect to the same if the assignment made by the 1887 deed had been effectual. I will call this deed the 1919 deed.

Now it is in evidence that the property subject to the said term of 1,000 years created by the will of the second testator is sufficient to provide the value at the death of Mrs. Williams of three-fourths of the investments then representing the said settled legacy, but I am not told, and I do not know, whether it is sufficient to provide the value of the whole of such investments. I am also not told, and do not know, whether Mrs. Wiliams was ever informed or knew at any material time whether or to what extent the property comprised in the term of 1,000 years would suffice to provide the amount of the settled legacy or any part of such amount. If the appointment of the funds to Mr. Jack Crawshay is ineffective, the fourth share taken by him in default of appointment has been effectively assigned by the 1919 deed and is available to provide the remaining one-fourth of such value. On the other hand, any interest taken by him under an appointment by Mrs. Williams (being a mere expectancy) would not have been effectively assigned by the 1919 deed (see *In re Brooks' Settlement Trusts* (1)), with the somewhat strange consequence that if she had left the fund to go in default of appointment the position of the issue of her marriage to Mr. Williams would have been more secure than she could possibly have made it even by a valid exercise of her power. I do not however suppose that Mr. Jack Crawshay would wish to dispute that the 1919 deed operated to assign the expectancy to the trustees of the 1887 deed according to the tenor of the 1919 deed.

(1) [1939] Ch. 993.

However that may be, the facts are that Mrs. Williams by a series of testamentary instruments beginning, so far as known, with a codicil dated May 1, 1907, to a then existing will and ending with her last will, dated, as I have said, June 13, 1924, appointed the whole of the settled funds to Mr. Jack Crawshay absolutely, using appropriate and practically identical expressions throughout the whole of the series. The draft of the codicil of May 1, 1907, is before me. It indicates some vacillation on the part of Mrs. Williams as to whether the appointee should be Mr. Jack Crawshay or Mrs. Greener (who was then unmarried) and there is in the margin of the draft a somewhat cryptic note by the conveyancing counsel who settled it that it would be better to select a nephew rather than a niece since the funds might in the case of a niece be caught by a covenant in her marriage settlement to settle after-acquired property. In the end, the appointment to Mr. Jack Crawshay was made, and it was repeated, as I have said, in all the subsequent testaments. At this date Mr. Jack Crawshay was under 13 years of age, and it appears that there were several other nephews and nieces of Mrs. Williams who were considerably older than that, but were for that reason presumably less likely to survive her. The draft of the codicil was settled on March 18, 1907, and on the same day the before mentioned counsel wrote an opinion dealing first with the point of construction (which he regarded as "doubtful") and then saying this: "I think that an "appointment by Mrs. Williams in favour of one of her "nephews and nieces would not be a fraud on the power "provided there is no antecedent arrangement or bargain "between Mrs. Williams and the appointee as to the manner "in which the appointed fund is to be dealt with: *In re* "*Crawshay* (1). The expression of Mrs. Williams' wishes "might be contained in the codicil itself (see the last cited case) "or in a separate paper. I think it would be better if it "were contained in a separate paper to be opened after "Mrs. Williams' death and no communication on the subject "should be made to the appointee during Mrs. Williams' "lifetime." I am told that this advice was almost certainly communicated to Mrs. Williams.

The next of Mrs. Williams' wills was dated January 8, 1910, and on January 16, 1910, she wrote a letter to Mr. Jack Crawshay, now 15 years of age. The original intention that it should be handed to Mr. Jack Crawshay after the writer's death may well have been abandoned, but it in fact survived, as did also a draft or copy of it put away with other papers of no or little importance, and this is what it says: "My dear Jack, You will not, I am sure, misunderstand "what I have done with regard to the disposition of money "in my will. It is scarcely to be imagined that any question "will arise that would possibly deprive your cousins Eliot "and Leslie"—meaning the writer's sons by her marriage to Mr. Williams—"of their just inheritance, and I have only "exercised my power of appointment under your grand-"father's will in case by any possibility any difficulty should "arise and must in that event trust to your honour that "reparation should be made. In case you may not know, "it was decided by your father and uncles' lawyers that in "consequence of the codicil to your grandfather's will the "100,000*l.* he left to me came to them at my death, and they "were honourable, kind and just enough to give up all right "to it so that there can hardly be any question of claim on "the part of anyone in the matter except the rightful inheritors "Eliot and Leslie. I have not as yet, dear Jack, seen very "much of you; before this letter reaches you we may be "better acquainted. In any case, I trust the transaction may "not cause you any trouble or bother and that these few words "from one then no longer here may not impose a very painful "duty and that you will not regard unkindly Your affectionate "aunt, Rose H. T. Williams." This letter really speaks for itself, and it certainly has a very material bearing on the case. I will refer to the question of its admissibility later. The next will of Mrs. Williams was signed on November 2, 1911, as to which I have no comment to make. That will remained unrevoked until after the death of the second testator, and the probate of his will. I cannot doubt that the substance of such will (so far as it affected her family) must have been known to Mrs. Williams. Indeed, the matter is placed beyond any doubt by a letter written to Mrs. Williams by her solicitor on April 10, 1919; the material part of such letter is as follows: "I am preparing a draft of a new will for you ". . . . You will remember that there has always been "a question whether it was competent for your three brothers "to secure the Consols legacy under your father's will to your "sons after your death, although they did all they could for "the purpose by signing a settlement in 1887. Mr. William

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(1) (1890) 43 Ch. D. 615.

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CRAWSHAY (DECD.), *In re.* HORE-RUTHVEN *v.* PUBLIC TRUSTEE (No. 2).

" Crawshay in his will has arranged for the money being " provided out of his estate . . . . should the settlement of " 1887 prove to be ineffectual and his will further provides " that Mr. Jack Crawshay (who would be one of those to " benefit if the deed of 1887 is not effectual) should as a " condition of taking any interest under his will confirm the " settlement of 1887 so far as he is concerned. This Mr. Jack " Crawshay has done. It will however still be necessary to " retain in your new will the provisions on the subject which " were inserted in your present will." The final sentence in that letter certainly raises some extremely puzzling questions. By the provisions which were to be retained the appointment to Mr. Jack Crawshay was obviously meant, but in what possible sense was she being told that its retention was " necessary " ? I have failed to find any other explanation of it than this : your brothers did what they could, and now Mr. Jack Crawshay has done what he could, to secure the Consols legacy to your sons, and now you must for that purpose continue to make the appointment to Mr. Jack Crawshay as in your present will. At that time the number of the nephews and nieces who would by surviving Mrs. Williams constitute the class entitled to the funds in default of appointment was more than four, so that Mr. Jack Crawshay's share might have been less than one fourth, as, of course, it might also have been more. It is difficult to see in what respect the exercise of this fiduciary power in favour of a particular object can properly have been described as " necessary " except for the purpose of implementing the conspiracy, or perhaps of fulfilling some promise or obligation made by Mrs. Williams to the second testator, or possibly to all her brothers. Having regard to the second testator's will and the 1919 deed, I should have thought that it might have been more appropriate to tell her that it had now become " unnecessary " for her to appoint the funds to Mr. Jack Crawshay, though open to her to do so either in order to compensate him for what the second testator was obliging him to lose or part with for the benefit of her family, or for any other reason ; but the matter was represented to her as one of necessity, that is, presumably, one in which she had for some reason or other no free choice. Although, as shown by the letter, Mrs. Williams was intending to make a new will in April, 1919, she did not in fact do so until August 11, 1920. Further wills were made on October 19, 1922, and December 14, 1928, and then the final and last will on June 13, 1934.

Paragraph 2 of the originating summons suggests that if the appointment was fraudulent it was so by reason of Mr. Jack Crawshay having before the date of the will assigned any interest which he might take by appointment upon trusts for persons who were not objects of the power. In my judgment, the reasons for its invalidity ought to be stated somewhat differently. It seems to me that the nephews and nieces who survived Mrs. Williams took vested interests in the settled legacy, and that her power to divest such interests by appointment was conferred upon her by the first testator in order that she might, fiduciarily, select one or more of them as recipients of the first testator's bounty to the exclusion or partial exclusion of the others or other of them upon a due consideration of their merits or needs. She was, of course, dealing with his property, and not with her own. That Mrs. Williams ever considered the matter in that light I find no hint at all. I am satisfied that from first to last she was thinking exclusively of her own children and their rights or wrongs. To use or attempt to use the power for their benefit, and so to defeat the plain wishes of the donor of the power, was certainly a most cynical act, though I am very willing to believe that Mrs. Williams was not in the least degree conscious that this was an impropriety, particularly, if, as I understand was the case, the first testator was reconciled to her marriage before his death. Mr. Jack Crawshay has sworn that to the best of his recollection and belief he did not, nor did any person acting for him, have any discussions with Mrs. Williams or her solicitors either before or after he executed the 1919 deed with regard to the execution or proposed execution thereof. This I readily accept, but he goes on to say that she did not at any time give him to understand that (either in view of the said deed or otherwise) she had made or would make any appointment in his favour in respect of the said settled legacy. While accepting this as representing the present recollection and belief of Mr. Jack Crawshay, it is very strange that when instructions (evidently on behalf of Mr. Jack Crawshay) were given to the conveyancing counsel before mentioned to settle the draft of the 1919 deed he was supplied with copies of (1.) the 1887 deed, (2.) the instructions of March 15, 1907, and his opinion, (3.) Mrs. Williams' will dated November 2, 1911, and (4.) the will and codicils of the second testator and he was at the same time asked to consider whether any alteration in Mrs. Williams' will was desirable in the then present circumstances. His opinion, dated January 28, 1919, was as follows: "In my opinion no "alteration in Mrs. Williams' will is necessary, but if she has, "as suggested in my opinion of March 18, 1907, expressed "any wish as regards the fund appointed by her to Mr. Jack "Crawshay in a separate paper, such paper should now be "destroyed." The discrepancy is obvious, and it is not easy to believe that Mr. Jack Crawshay was not fully aware of the existence and purport of the documents, including Mrs. Williams' will, which were being put before counsel on his behalf. I think that his memory must be somewhat at fault. I am told that the purport of the last mentioned opinion was almost certainly conveyed to Mrs. Williams, though she appears to have disregarded the recommendation that she should destroy the letter. I should add that the solicitors acting for Mr. Jack Crawshay in 1919 were the same who acted at all material times for Mrs. Williams and many other members of the Crawshay family.

As to the general principles which govern the question of fraudulent appointment there are so many judicial pronouncements of high authority that it is difficult to make a choice, but I may refer to a short passage from the judgment of Lord Parker of Waddington in the case in the Privy Council of *Vatcher* v. *Paull* (1). "The term fraud in connexion with "frauds on a power does not necessarily denote any conduct "on the part of the appointor amounting to fraud in the "common law meaning of the term or any conduct which "could be properly termed dishonest or immoral. It merely "means that the power has been exercised for a purpose, "or with an intention, beyond the scope of or not justified "by the instrument creating the power. Perhaps the most "common instance of this is where the exercise is due to some "bargain between the appointor and appointee, whereby the "appointor, or some other person not an object of the power, "is to derive a benefit. But such a bargain is not essential. "It is enough that the appointor's purpose and intention is "to secure a benefit for himself, or some other person not "an object of the power. In such a case the appointment "is invalid." I would further, for the sake of completeness, read the well-known passage from Lord Westbury's speech in *Topham* v. *Duke of Portland* (2): "Without further dwelling "on the matter, inasmuch as your Lordships concur in

(1) [1915] A. C. 372, 378.

(2) 11 H. L. C. 32, 54.

"opinion, I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power. I think it would be endangering the whole of the established principles of our law upon this subject if we were to permit a transaction of this kind to stand, or to hold that it is a transaction which can be reconciled with the faithful, sincere, just, and honest exercise of the power committed to the appointor, and which he is to exercise as a trustee." But I ought, having regard to those last words, to add the following observation from Farwell on Powers, 3rd ed., p. 458 : " It will be observed that the essential notion is disposition beyond the scope of the power, not breach of trust by the donee, though it is not unusual to speak of the donee of a limited power as being in a fiduciary position. His position is referable to the terms, express and implied, of the instrument creating the power and the implied obligation not to appoint for an ulterior purpose, and is not in truth founded, like the position of a trustee, upon a state of conscience imputed to him by courts of Equity. But there is a strong analogy between the obligation imposed on the donee by the terms of the instrument creating the power and that imposed upon a trustee by the terms of the settlement creating the trust."

As regards other authorities, those who seek to support the appointment have relied chiefly on *In re Crawshay* (1), referred to in counsel's opinion of March 18, 1907. I am unable to regard that case as a satisfactory one, for it seems to me to be somewhat opposed to the general trend of the decisions on the subject. In any case, it does not seem to me to be really applicable to the facts of the present case. The headnote reads as follows : " Under a settlement, made in 1828, a testator had power to appoint by will to and among his children a sum of 35,000*l*. By his will, made in 1865,

(1) 43 Ch. D. 615.

" be bequeathed 150,000*l.* to his daughter Jessy, and directed " that this legacy should be paid to four trustees named in " the will, and should be held by them upon trust for her " during her life, with remainder for her issue. The will " then recited the power of appointment contained in the " settlement, and by virtue of that power the testator " appointed 10,000*l.*, part of the 35,000*l.*, to the same " daughter ; but his will was that the same should be paid " to the trustees thereinbefore named with reference to the " legacy of 150,000*l.*, and should be held by them upon " the trusts thereinbefore declared thereof. The testator " then appointed two sums of 10,000*l.* and 7,000*l.* respectively " in favour of two other daughters, and he appointed the " residue of the 35,000*l.* to his son Robert absolutely. And, " in case he had exceeded his power in not appointing the " 10,000*l.* to his daughter Jessy unconditionally, but in directing " the settlement thereof, and in case his said daughter, or " her husband, or others having any right or power to object " to the settlement thereof as aforesaid, should so object, " or should not confirm such settlement, if required so to do, " then he appointed that the said sum of 10,000*l.* should go " and belong to his son Robert, ' but who will I am assured " ' settle the same voluntarily in the manner in which I have " ' attempted to settle the same as aforesaid so as thereby to " ' carry out my wishes.' After the testator's death the son " Robert executed a declaration of trust of the 10,000*l.* to " carry out his father's wishes. There was no evidence " (other than the will itself) of any bargain between the son " and the testator that the former would settle the 10,000*l.* :— " Held, that the appointment of the 10,000*l.* in favour of the " daughter Jessy was invalid ; that the 10,000*l.* did not pass " to the son under the appointment of the residue to him ; but " that, under the last appointment to him, there being only " an expression of the testator's wish, and no evidence of any " bargain by the son that the fund should be settled, it passed " to him absolutely, free from any obligation to settle it, " it, and was, therefore, validly appointed. *In re Marsden's " Trust* (1) commented on and explained."

In the latter case the objects of the power were the children of the marriage ; the donee (the wife) desired to benefit her husband. To effectuate this, she appointed to her eldest daughter unconditionally on the face of it, but under an arrangement between the appointor and her husband that on the appointor's death the daughter should be informed by her father of the intention with which the appointment was made and so be induced to carry out that intention. Kindersley V.C., at page 601 of the report says this: " it is not necessary that " the appointee should be privy to the transaction, because the " design to defeat the purpose for which the power was " created will stand just the same, whether the appointee was " aware of it or not, and the case of *Wellesley* v. *Earl of Mornington* (1) shows that it is not necessary, in order to bring the " case within the scope of the jurisdiction on which this Court " acts, that the appointee should be aware of the intentions of " the appointment, or of its being actually made." In Farwell on Powers, 3rd ed., at pp. 478–9, *In re Marsden* (2) is referred to in the words just used by me, and then *In re Crawshay* (3) is mentioned without comment. I say that that case differs from the present case because there the appointor merely believed that the appointee would in fact utilize the appointed property in a particular way; no pressure or solicitation was applied; and it was certainly never represented that any other person than the appointee was the rightful inheritor of the appointed property.

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(1) 4 Drew. 594, 601.

Surer guidance can, in my judgment, be obtained from the case of *In re Wright* (4). From that case I derive the following relevant propositions: (1.) that an intention to benefit a non-object may vitiate an appointment whether the intention is successfully achieved or not; (2.) that it is not necessary to establish any bargain; (3.) that if there were originally a corrupt intention the onus is shifted and rests on those who seek to show that it was abandoned, and (4.) that the letter and other documents to which I have referred are properly admissible as evidence in this case. The whole of that part of the judgment of P. O. Lawrence J. which deals with the question of fraud beginning at p. 115, where he deals with the question in the case, is relevant, but I need not trouble to read it. On the question of the onus of proof, I have come to the conclusion that the letter of January 16, 1910, is plainly indicative of a corrupt motive and a corrupt intention on the part of Mrs. Williams, and I can find no proof that such motive and intention were ever altered or abandoned by her. She regarded her two sons as the rightful inheritors, and nothing was further from her thoughts, hopes or wishes than that any nephew or niece of hers should take any benefit under the appointment. From first to last she was thinking not of them but of her own family. In fact, it seems to me that Mrs. Williams misunderstood the nature of her rights and duties in regard to this power of appointment; that she regarded the funds as though they were her own property or in any case attempted to use them to further ends and objects quite outside the scope of the power. In my judgment, the case is typically and characteristically one of fraud (in the technical sense) and I must so decide. I would only add this, that I have never heard of a case before this one in which the persons sought to be benefited are not merely negatively non-objects of the power, but are the very persons whom the donor of the power has positively and affirmatively pointed out as disqualified from becoming participants of his bounty, and has deliberately and in the clearest terms excluded them from the ambit of his beneficence. An order must now be drawn up containing the declaration on the point of construction, and a declaration that the appointment has failed as being a fraud on the power. The costs of all parties taxed as between solicitor and client must be raised out of the settled fund.

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(1) (1855) 2 K. & J. 143.

(2) 4 Drew. 594.

(3) 43 Ch. D. 615.

(4) [1920] 1 Ch. 108, 115.

Solicitors: *Lawrence, Graham & Co.; Farrer & Co.; Gilbert Samuel & Co.; Wellington Taylor & Sons.*

H. L. L.

C.A.
1947
Mar. 21, 24
Lord Greene M.R., Cohen and Asquith L.JJ.

M. W. INVESTMENTS LIMITED *v.* KILBURN ENVOY LIMITED.

Landlord and tenant—Lease—War-time lease—Option—Validity—Effect of emergency legislation validating the lease—Validation of War-time Leases Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 34), *s.* 1, *sub.s* 1; *s.* 3, *sub-s.* 3.

By a lease, dated February 10, 1942, property was expressed to be demised "for the term of three years from January 5, 1942, or for "a period covering the duration of hostilities between Great Britain "and Germany and Italy and twelve months after the date of the "termination of hostilities whichever period shall be the longer ". . . ." By the validation of War-time Leases Act, 1944, s. 1, sub-ss. 1 and 2, this lease was validated by the alteration of the term to "a term of ten years, subject to a right exercisable "either by the landlord or the tenant to determine the tenancy, "if the war ends before the expiration of that term, by at least

" one month's notice in writing given after the end of the war." Clause 5, sub-cl. 4 of the lease provided that if the term of the lease should not last for seven years the tenants should have power to give three months' notice in writing before the expiration of the term for the grant of a new lease up to January 5, 1949. The tenants gave such a notice on December 4, 1945, and the landlords gave one month's notice, on October 31, 1946, terminating the lease :—

Held, notwithstanding the provisions of the Act, that the option was valid and operative and that on the term of ten years being brought to an end by the landlord's notice, the tenant's earlier notice took effect and entitled them to the grant of a further term up to January 4, 1949.

Decision of Vaisey J. (ante, p. 125) reversed.

The Validation of War-time Leases Act, 1944, s. 3, sub-s. 3, provides : " Nothing in the said section one shall affect a provision " of an agreement to which the section applies, being a provision " which does not relate to the duration of the tenancy, and any " such provision shall continue to apply in relation to the tenancy " as it takes effect under that section."

Held, that the effect of this sub-section is that s. 1, which alters the habendum of a war-time lease so as to make the term of the lease valid, is not to have any operation in respect of provisions in the lease which are not conditioned by or affected by the habendum. But in the case of a provision which is conditioned by the habendum the sub-section contemplates that s. 1 is to have its full operation.

Appeal from Vaisey J. (1).

By a lease dated February 10, 1942, M. W. Investments, Ld. (hereafter called the landlords) demised a cinema at Kilburn to Kilburn Envoy, Ld. (hereafter called the tenants) " for " the term of three years from January 5, 1942, or for a period " covering the duration of hostilities between Great Britain " and Germany and Italy and twelve months after the date " of the termination of hostilities whichever period shall be " the longer, subject to the extension of such period as provided " by cl. 5 (4.) hereof " at the yearly certain and contingent rents and insurance rent therein stated. By cl. 5 (4.) it was provided : " If the term of this lease shall not extend for " a period of seven years from the said January 5, 1942, and " the lessee shall be desirous of continuing the term for a full " period of seven years from such date and of such desire " shall give not less than three calendar months' notice in " writing prior to the expiration of the term granted by this " lease then the lessor will grant a further term up to

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(1) Ante p. 125.

"January 5, 1949, at a yearly rent equivalent to the highest "aggregate certain and contingent rents paid under cl. 1 "hereof in any year during the term of this lease and insurance "rent but otherwise upon the same terms and conditions as "are herein contained except the present clause." The lease was rendered invalid by reason of the term being uncertain but this was remedied by the validation of War-time Leases Act, 1944, s. 1, sub-s. 1 and 2 (1).

By a notice in writing, dated December 4, 1945, the tenants purported to exercise the option by requiring the landlords to grant a further term up to January 5, 1949. Doubts arose whether the option was exercisable having regard to the provisions of the Act, and the landlords took out a summons to have determined the effect of the lease and of the purported exercise of the option.

Vaisey J. held that having regard to the Act the lease must be treated as having, in the events which had happened, created a term of ten years from January 5, 1942, determinable by either party by a month's notice in writing given after May 9, 1945 (2), and that the option had therefore never been and never could be exercisable. As a result of this decision the landlords gave one month's notice on October 31, 1946, terminating the lease.

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(1) By the Validation of War-time Leases Act, 1944, s. 1, sub-s. 1: "Subject to the provisions of this section, any agreement, whether entered into "before or after the passing of "this Act, which purports to "grant or provide for the grant of "a tenancy for the duration of the "war shall have effect as if it "granted or provided for the grant "of a tenancy for a term of ten "years, subject to a right "exercisable either by the landlord or the tenant to determine "the tenancy, if the war ends "before the expiration of that "term, by at least one month's "notice in writing given after the "end of the war."

Sub-section 2: "In this section "the expression 'the duration of "'the war,' in relation to any "agreement, means a period which, "on the proper construction of "the words used in the agreement "whatever they may be, ends "with or within a specified time "after, one of the following "events—. . . . (b) the end of the "war or of hostilities as respects "any particular state or states of "any particular theatre or "theatres of war."

(2) By St. R. & O. 1945 No. 703/L.8: "For the purposes "the construction of any "tenancy agreement, the ninth "day of May, 1945, shall (unless "the context requires or it is "shown by admissible evidence "that the agreement should be "otherwise construed) be treated "as the date of the end of the war "and of hostilities as respects "each and all of the states in "Europe with which His Majesty "has been at war at any time since "the third day of September, "1939 . . . ."

C. A.

1947

M. W. INVESTMENTS, LD. *v.* KILBURN ENVOY, LD.

The tenants appealed.

Andrew Clark K.C. and *Charles Russell* for the tenants. The joint effect of the Act and the lease was: (1.) The tenants got a tenancy for ten years, subject to determination by one month's notice given after May 9, 1945, (2.) the tenants also had the right to give the landlords not less than three months' notice requiring them, in the event of the tenancy being determined before January 5, 1949, to grant a further term up to that date, at the highest aggregate rent paid by the tenants in any year prior to the date on which the notice to determine took effect.

Apart from the Act the option could have been exercised at any time by the tenants giving notice, but the notice would have been inoperative unless the period (war plus twelve months) ended within seven years from the date of the lease. After the Act the only way the clause could operate was by the termination of the statutory period before January 5, 1949.

If one month's notice to determine is given under the Act we concede that our notice in exercise of the option must be given before the expiration of that notice.

Evershed J. recently considered in *Brilliant* v. *Michaels* (1), whether uncertainty in the commencement of a lease invalidated it, and came to the conclusion that it did not, provided it could be ascertained at the time when it was sought to enforce the agreement. There is no difficulty in reconciling the option with the Act; such difficulties as there are, are inherent in the option itself and equally affected the original lease. Nor is the option a term "relating to the "duration" of the lease, within the meaning of the Act, because the tenancy is one within s. 1, sub-s. 6, that is, a tenancy limited by reference to the duration of the war. Section 3, sub-s. 3, is a saving clause; it takes nothing away.

Clause 5 (4.) of the lease is an agreement to grant a new tenancy; it provides for the grant of a new term. It might equally well have been an entirely separate document; if it had been, it would have been impossible to contend that the Act applied to it at all. An agreement to grant a lease on the termination of the war with Germany would be good, becau

(1) (1944) 114 L. J. (Ch.) 5.

the date would be ascertainable before the commencement of the term, and it would not be touched by the Act. Here, the option is a contract to grant a lease provided certain conditions are fulfilled, namely, (1.) that three months notice is given before the expiration of the existing term ; and (2.) the existing term must end before January 5, 1949. The moment those conditions are fulfilled, the dates from and to which the new lease is to run are certain and fixed.

As to the rent, it is necessary to read cl. 5 (4.) of the lease as though it were amended by the Act. It then becomes a reference to the highest aggregate rent for any year before the expiry of the statutory notice, provided it expires before January 5, 1949. The Act creates no difficulty that was not in the lease as originally drawn.

The object of the Act was simply to get over the difficulty of *Lace* v. *Chantler* (1). It was intended to interfere as little as possible with the intention of the parties, merely substituting a term certain for a term uncertain. In the language of the preamble it is an Act " to validate " agreements, not to *in*validate them. The legislature goes out of its way to preserve what the parties have agreed, so far as practicable. It takes away only references to the duration of the war for which it substitutes ten years determinable. The words " provisions relating to the duration of the tenancy " in s. 3, sub-s. 3, relate to provisions within s. 1, i.e., those referring to the duration of the war, which " affect " must mean " adversely affect."

[LORD GREENE M.R. But s. 3, sub-s. 3, does not validate an invalid provision, and you are affecting it by substituting a new term.]

There is nothing invalid in the option itself ; it is a valid option for the term of the lease, whatever that is—viz., before the Act, three years. That is not invalidated and by s. 3, sub-s. 3, the valid option is to continue to operate for the term as it takes effect under the section. We submit, therefore, (1.) that Vaisey J. was wrong in holding that the option related to the duration of the tenancy; and (2.) if it did, s. 3, sub-s.3, did not affect it, and there is nothing in s. 1 to take it away. The altered term has to be read into the lease ab initio.

Gray K.C. and *Mulligan* for the landlords. The judgment should be upheld, both on the grounds stated by Vaisey J., and on wider grounds. The tenants' argument ignores the

(1) [1944] K. B. 368.

language, both of the Act and of the lease. The Act does not, strictly speaking, validate leases. It substitutes a valid lease for an invalid one. This lease was never valid, and is not valid now.

[Cohen L.J. It validates, and at the same time varies.]

The Act is in effect saying: The landlord and tenant have agreed to something which does not amount to any valid term: we are going to compel them to take something they have not bargained for, but which we think will in most cases work out fairly.

Duration of the tenancy is one thing; length of the term is quite another. The statutory term is "ten years," not "ten years determinable." The option can therefore have no operation in view of the initial words "If the term of this "lease shall not extend for a period of seven years." That cannot happen as the term is for ten years.

[Lord Greene M.R. Section 1, sub-s. 1, provides how the whole agreement is to have effect and the statutory term must be inserted right through it.]

The option does not relate to the duration of the term and therefore in view of s. 3, sub-s. 3, s. 1, sub-s. 1, does not apply. The option does not fit and can have no effect. There is a definite distinction between the length of term, which is ten years, and the duration of the term in view of the power to determine it at an earlier date. The whole effect of the Act is to validate what would otherwise be an invalid lease. It cannot be right that if the landlords seek to determine the lease in the manner provided for in the Act, it can be defeated by the exercise of the option under cl. 5 (4.) The power to determine by one month's notice is irreconcilable with the option. If s. 3, sub-s. 3, applies then the option still will not fit in with the substituted lease. There is no provision in s. 3, sub-s. 3, for any modification of any provision of the lease apart, of course, from the variation of the lease in the habendum under s. 1. Further the option would not be exercised in any case until it was definitely known that the term did not extend for seven years and a proper three calendar months' notice had been given before the expiration of the term and this cannot happen in view of the statute. Nor is it possible to ascertain the highest aggregate rents paid. The appeal ought therefore to be dismissed.

No reply was called for.

Lord Greene M.R. (after stating the facts): The question for decision depends on the operation of the Validation of War-time Leases Act, 1944, in relation to the document purporting to be a lease dated February 10, 1942. It was admittedly invalid as a lease for one reason and one reason only, that the term was not fixed; the continuance of the term depended on something which, at the beginning of the lease, was uncertain, namely, the duration of hostilities between Great Britain and Germany and Italy. If it had not been for that defect in the document, the operation of the option clause, cl. 5, sub-cl. 4, would have been quite simple. If the war plus twelve months did not extend for seven years from January 5, 1942, the option was to be exercisable and the result would have been that the tenant would have obtained his full seven years; but the lease was invalid and the effect of the invalidity of the lease would have been, subject to a point I will mention in a moment, to invalidate the option clause too. I have said the lease was invalid, and I say it without prejudice to a question which I find it unnecessary to decide: It was suggested that the lease was a valid lease for three years and that the option clause could have been fitted in to it. I do not find it necessary to express any opinion as to that argument. Vaisey J. inclined to think that the lease would have been a valid lease for three years. Mr. Gray argued that it would not, because he said on the true construction of the habendum it was for the duration of the war or three years. Anyhow, the point that we have to consider is the application of the Act.

There is a general observation that I think may be made with regard to this Act. It is common knowledge that it was passed to meet a very awkward situation caused by the circumstance that it was not realized, save perhaps in more instructed quarters, that a lease for the duration of the war would be invalid in law. There were, I suppose, hundreds of such leases made during the war. It was to remedy that position that this relieving statute was passed. One thing which, I think, appears clear on the face of the statute is that the legislature was minded to give to the parties who in all good faith had entered into these invalid agreements something which would be as nearly as possible a valid equivalent of what they had intended to contract for. The way in which it was done was this: For the invalid term, which I comprehend under the universal description of a term for the duration of the war, was to be substituted a term of ten years determinable by notice given by either side after the end of the war, if the war should end before the expiration of that ten-year term. That was putting the parties as nearly as possible into the position in which they would have been if the provisions of the lease had been valid from the first. The notice which either party is empowered to give takes, for practical purposes, the place of the end of the war, just as under the contractual terms, ignoring the twelve months in this particular case, which is irrelevant for the present point, the term would have come to an end at the expiration of the war. Now it can be brought to an end by either party, if either party so wishes, a month after the expiration of the war by giving notice. As I say, in substance the determination by notice takes the place of the determination by the end of the war. It is important to have that point in mind, because it has a bearing on the construction of the whole Act.

Section 1 is expressed in simple language, and I ask myself: Have we here an agreement? The answer is: We have an agreement dated February 10, 1942. I then ask myself: Does that agreement purport to grant a tenancy for the duration of the war, a phrase which is interpreted in the Act and covers the present case? The answer to that is: Yes. Then I say: What then is to be the effect of the Act? That agreement is to have effect as if it granted or provided for the grant of a tenancy for a term of ten years determinable in the manner stated. The statute tells me to treat this document as though the term it created had been a term of the nature described in s. 1. When I turn to s. 7, sub-s. 3, I find that the Act, subject to the provisions of s. 3, is to be deemed "to have had effect, in relation to any agreement as "from the date on which the agreement was entered into." We therefore have a document, the one and only blot in which, a blot which invalidated the document (subject to the three years argument, of course, which I have mentioned), has been removed by statute and, in place of the invalid clause in the habendum, there is substituted the statutory provision. We therefore now have a lease which is a lease for ten years determinable by notice. If there had been nothing else in the statute, I should not have felt any difficulty. I should have construed the document on the footing that it has now been amended ab initio in the manner provided by the statute. It is to be observed that the statute does not limit its operation to a mere alteration of the habendum. It provides that the agreement—that is, the whole agreement—is to have effect as if the habendum had been of the kind mentioned in s. 1.

Bearing that in mind, what am I to do when I come to the option in cl. 5, sub-cl. 4? I should have thought myself that if in the habendum to this document there had been inserted for the contractual term the statutory term, the construction of sub-cl. 4 of cl. 5 would not have been difficult. It would have been necessary to reconcile the language of that sub-clause with the language of the habendum as altered by statute. The result, it seems to me, clearly would have been that if the lease were brought to an end by notice within the seven years, the option would be a valid one exercisable by the tenant. That construction, it seems to me, would have been the only one which could have been put on this document as soon as the new habendum provided for by the statute was substituted for the contractual habendum. Otherwise you would be left in the position that the two parts, namely, the statutory habendum and cl. 5, sub-cl. 4, would have been irreconcilable. That was what the learned judge found had happened, because he said that he could not reconcile the two provisions; but, with all respect to him, I do not find any difficulty about it. I am prepared to accept what I think the learned judge stated quite accurately (1): "On the other hand, such of the original provisions as contra-"dict or conflict with or are incompatible with the positive "provisions of the Act must be rejected, or at any rate "modified, when, if, and so far as, they are susceptible of "modification." If I may say so with respect, I entirely agree with that statement, and Mr. Gray for the landlords accepted it. Therefore, in so far as the alteration of the habendum requires a modification or alteration of words in cl. 5, sub-cl. 4, in order to give full effect to what s. 1 tells us to do, those words must be modified accordingly. Section 1, as I have said, appears to me to give a clear direction as to what is to be done to this invalid clause in the lease, and I cannot myself see how the direction can be satisfied unless any other clause in the lease which is referential to or dependent upon the valid term is construed or modified accordingly. Mr. Gray would not accept that argument. He says that the term of the lease when altered by the statute is a ten-year term, and that it is impossible to reconcile the

(1) Ante p. 130.

language of cl. 5, sub-cl. 4, with the conception of a ten-year term, because the option only arises if "the term of this "lease" shall not extend for a period of seven years from January 25, 1942. He says that to talk about a ten-year term not extending for seven years is nonsense and therefore that the option clause cannot be dovetailed into the lease as modified by the statute. That seems to me to be flying in the face of what s. 1 provides. Section 1 tells you to alter the habendum and to make any consequential alteration that is necessary and permissible. I should have thought myself that if this lease had originally contained the habendum as fixed by the statute, then the only way of construing the option clause would have been by reconciling the language of the two in the way I have suggested. Otherwise the court would be left in the position, which it will never accept unless it is absolutely forced to do so, of saying: "Here are two "irreconcilable provisions and one of them must be rejected "and treated as a nullity." If the parties had by contract put in what is now the statutory term, I myself would have found no difficulty, as a pure matter of construction, in giving the effect to the option clause which is contended for by the tenants. The gist of Mr. Gray's argument is in effect, although he disclaimed it, to ask us to construe the option clause as though the statutory alteration in the habendum had never been brought about. That is a conclusion which I cannot accept.

That brings me to the consideration of s. 3, sub-s. 3, of the Act on which a good deal of argument turned. There has been argument as to whether this option clause is a provision which does or does not relate to the duration of the tenancy within the meaning of that sub-section. Vaisey J. held that it did relate to the duration of the tenancy. That was one of the grounds that he gave for his decision in favour of the landlords. It was suggested by Mr. Andrew Clark for the tenants that sub-s. 3 is really a saving sub-section and his first argument was that the option clause was a provision which did not relate to the duration of the tenancy and therefore that it was saved. I do not myself take that view. I think the learned judge was right and Mr. Gray was right in maintaining that the option clause was a provision which did relate to the duration of the tenancy. My reason is this: The phrase "relate to" in that context is obviously a very wide phrase and, much as I dislike paraphrases, I think it means

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something like this, a provision which is not conditioned or affected by the duration of the tenancy. That makes sense, because sub-s. 3 excludes the operation of s. 1 in the case of provisions which do not relate to the duration of the tenancy, but obviously, to make sense of the Act and make it workable, a provision which does relate to the duration of the tenancy must, if the Act is to have its full effect, be affected by s. 1. This option clause is a provision which relates to the duration of the tenancy, in my view, because the exercise of the option is contingent on that duration, and accordingly the Act does, in my opinion, when it alters the habendum, necessarily alter such provisions in other parts of the lease as are dependent in any way on the length of the term contemplated by the contractual habendum. Accordingly, I construe sub-s. 3 as meaning that s. 1 is not to have an operation in respect of provisions in the lease which are not conditioned by or affected by the habendum. Those are to remain as they were, valid or invalid, but once you find a provision which is conditioned by the habendum, the sub-section contemplates that s. 1 is to have its full operation. That brings me back to what I said before. If s. 1 had stood alone, taken in combination with the retrospective sub-section, s. 7, sub-s. 3, the effect would have been that you must construe the whole document in the light of the alteration in the habendum which is effected by the statute. I therefore do not find myself in the least embarrassed by s. 3, sub-s. 3, and accepting the judge's view of it, which I think is right, it seems to me to operate not against the tenants, but in their favour.

Mr. Gray's argument was really based on a very technical construction of the option clause and a construction which, however right it would have been if the contractual habendum had been a valid one, is, as it seems to me, impossible to maintain, having regard to the directions in the Act. He says that the term of the lease is now ten years and that it is not true to describe the length for which the lease in fact lives as the "term" of the lease, so that if notice had been given to bring that ten-year term to an end at the end of nine years it would not have been correct to say that the lease had had a nine-year term. However right that argument might be in other contexts, I find it unacceptable in this particular context and I do not think I need add anything more to what I have said as to the necessity of reconciling inconsistent provisions in the same document. If, indeed, the technical meaning of the word "term" is so strong that it cannot yield to a context, which is really what Mr. Gray is saying, then I accept the principle I quoted from Vaisey J.; the word "term" must be altered and some other phrase be substituted. But if you read the words "If the term of "this lease—that is to say a ten-year term determinable "by one month's notice—shall not extend for a period of "seven years," the whole thing makes sense. If you read the word "term" in that context, which is the right context having regard to the statute, it would mean the actual period for which the lease had lasted.

The other point on which the learned judge based his decision was the impossibility, as he thought it, of reconciling the provisions as to rent contained in the option clause with the new habendum substituted by the statute. The rent in the reddendum under the original document was first of all a minimum yearly rent, secondly an additional rent based on net takings and, thirdly, what is sometimes called an insurance rent, that is to say, a yearly sum equivalent to the amount which the landlords from time to time pay by way of premium. That insurance rent was to be paid once a year immediately following the payment by the landlords of such premiums. The year under the lease which began on January 5, 1942, was the year ending January 4 in each year. That is the rent year. Then the option clause provides that the rent to be paid under the new tenancy to be granted under the option clause is to be "a yearly rent equivalent to the highest "aggregate certain and contingent rents paid under cl. 1 "hereof in any year during the term of this lease and insurance "rent." The learned judge found it difficult to see exactly how that could be fitted in. When once the option clause is construed in the way in which I consider that it ought to be construed, I find no difficulty at all. The year is the lease year ending January 4. Obviously, having regard to the power to give a month's notice, the tenancy may be put an end to in the middle of the year and in such a case the rent must be the rent for the highest full year since the beginning of the tenancy, disregarding the broken part of the year. That might have happened if the original contractual habendum had been good, because the war cannot have been contemplated as likely to end on a January 4. You would then have had to disregard the broken year. The same thing can be done under the new statutory provisions. I feel no difficulty about that and, indeed, Mr. Gray admitted that that argument would not stand if he was wrong on his main argument that the option clause would not fit the new conditions at all.

There is only one minor point that I should mention. Mr. Gray suggested that the option could not be exercised until it had been ascertained that the lease would not extend for seven years. That argument, in my opinion, is unsound. In the case of an option conditional on the happening of a future event, there is nothing to prevent its exercise at once, although, of course, it will have no effect unless the event happens. You need not wait until the event happens, unless, of course, the language of the option clearly says so, and in the present case it has not that effect.

I must complete the facts to show what happened. The Act was passed on August 3, 1944. On May 9, 1945, came the end of the war as declared by St. R. and O. 703 of 1945. On December 4, 1945, the tenants gave notice in writing exercising the option. On May 2, 1946, the landlords took out the originating summons which has led to this appeal. Vaisey J. declared that the option never was and never could be exercisable. His judgment was on October 25, 1946, and relying on that the landlords gave the month's notice required by the statute on October 31, 1946. The effect of all that seems to me to be that the determination of the lease or the expiration of the term, within the meaning of the option clause as properly construed, was the date on which the landlords' notice took effect. That notice, as I have said, took the place under the statute of the end of the war which the parties had provided for contractually. The tenants, however, had given not less than three calendar months' notice in writing prior to the expiration of the term, which took effect on the expiration of the landlords' notice of October 31, 1946. I say expressly "expiration of the term." That is the phrase mentioned in the option clause; but I have already explained that that phrase and reference to the term must, in my opinion, in order to comply with the directions of s. 1 of the Act, be construed as meaning the actual ending of the term in the events which happened and the term came to an end in the events which happened when the landlords' notice expired.

The result, therefore, is that the appeal must be allowed with costs here and below.

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COHEN L.J.: Mr. Gray argued that the option in question here was a provision relating to the duration of the tenancy and that therefore sub-s. 3 of s. 3 of the Act did not apply. With this I agree and I do not desire to add anything to the reasons given by my Lord for rejecting Mr. Gray's argument based on this construction of the Act and the option clause. Mr. Gray argued, alternatively, that if the option clause was not a provision relating to the duration of the tenancy, sub-s. 3 of s. 3 applied, and that he was entitled on this construction to succeed, because the option clause was, as he said, invalid ab initio and s. 3, sub-s. 3, did not cure the invalidity. I do not think it necessary to decide this point, but I am by no means satisfied, as at present advised, that it is well founded. It seems to me there is much to be said for the alternative view, which I would summarize as follows: (I.) If the option does not relate to the duration of the tenancy it is because a provision only relates to the duration of a tenancy within sub-s. 3 of s. 3 if it fixes or directly affects the duration of the tenancy; (2.) None the less, having regard to s. 7, sub-s. 3, and s. I, sub-s. I, all the provisions of the agreement must be construed as from the date of its execution as if for a reference to the term purported to be created thereby there was substituted a reference to the term of ten years determinable as in s. I, sub-s. I, mentioned; (3.) If so construed, the option clause is not invalid, notwithstanding that in its original form it might have been invalid—indeed, probably was invalid—owing to the uncertainty as to the duration of the war. The invalidity being removed, I do not need to add anything more on the question of construction, because the same result would follow as has been indicated by my Lord in dealing with the alternative basis. For these reasons, I agree with the order proposed by my Lord.

ASQUITH L.J.: I agree with the conclusions of my Lord. I think those conclusions follow from the unassisted operation of s. I, and s. 7, sub-s. 3, of the Act, without recourse to s. 3, sub-s. 3. Indeed, if it were necessary to decide the point, I should incline to the view that s. 3, sub-s. 3, does not apply, since the option clause seems to me to be a provision which does relate to the duration of the tenancy and is therefore outside the sub-section. The entire argument for the landlords, as it seems to me, hinges on the assumption that the Act draws a vital distinction between the statutory term of

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ten years and the duration of the tenancy, which may well be less if the one month's notice is given to determine the ten-years term. According to this argument, in applying the Act to the contractual option in cl. 5 you have to substitute for the words " term of the lease " " term of ten years," not " term of ten years determinable at one month's notice." It seems to me, for the reasons given by my Lord, which I will not repeat, that the plain intention of the Act is that the latter and not the former substitution should take place and, if so, there is no difficulty in amalgamating the statutory and contractual provision into a coherent and consistent whole I agree that the appeal succeeds.

Appeal allowed.

Solicitors : *J. G. Bosman, Robinson & Co. ; Harringtons.*

H. C. G.

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Mar. 28, 31.

In re BUENOS AYRES GREAT SOUTHERN RAILWAY CO. LTD.

THE COMPANY *v.* PRESTON

Company—Preference stock—Stockholders right to fixed dividend out of annual profits—Profit made after losses over several years—Director's power to transfer undivided profits to reserve—Profits available for dividend.

The articles of association of a South American railway company incorporated in 1862 under English law provided that the holders of preference stock should be entitled to receive out of the profits of the company for each year a fixed dividend of 5 per cent. per annum, or so much of such dividend as the said profits should be sufficient to pay. The articles also created a reserve fund, and empowered the directors from time to time to carry to such fund so much of the undivided profits as they should think fit. After incurring heavy losses on revenue account for several years the company made profits in one year sufficient to pay the full dividends on the 5 and 6 per cent. preference stock. The directors being of the opinion that it would be unwise to pay such dividends, assuming they could do so, a summons was taken out by the company, asking whether on the true construction of the memorandum and articles the holders of preference stocks were entitled to be paid any dividends:—

Held that " profits of the company " in the articles meant profits available for dividend after setting aside to reserve or carrying forward such amounts as the directors thought fit, and as they had decided that the whole of the profits for the year ought so to be treated, the preference stockholders were not entitled to receive any dividend.

Long Acre Press, Ld. v. *Odhams, Ld.* [1930] 2 Ch. 196 and *Fisher* v. *Black & White Publishing Co., Ld.* [1901] 1 Ch. 174 applied.

ADJOURNED SUMMONS.

The facts as stated in the judgment were as follows.

The Buenos Ayres Great Southern Ry. Co. was incorporated in the year 1862 under the Joint Stock Companies Acts, 1856 and 1857 and its present authorized capital was 50,000,000*l.* divided into 32,000,000*l.* Ordinary Stock, 8,000,000*l.* 5 per cent. preference stock, 8,000,000*l.* 6 per cent. preference stock and 200,000 shares of 10*l.* each (all of which shares are at present unissued). 3. The original capital of the company was 750,000*l.* divided into 75,000 shares of 10*l.* each. The capital had been from time to time increased and all shares which had been issued and fully paid up had been converted stock. Immediately before the passing of the first of the special resolutions hereinafter mentioned the capital was 9,500,000*l.* divided into 3,600,000*l.* stock and 590,000 shares of 10*l.* each. 4. By special resolutions passed and confirmed on October 10 and 15, 1889: (*a*) The capital was increased by 2,500,000*l.* divided into 250,000 shares of 10*l.* each. (*b*) The said 250,000 shares and 50,000 of the already existing shares of 10*l.* each (an aggregate of 3,000,000*l.* in 10*l.* shares) were constituted as preference shares. (*c*) The rights to be attached to such preference shares (being those hereinafter more particularly stated) were defined. 5. By special resolutions passed and confirmed on April 20 and May 5, 1898, the capital was increased by 4,000,000*l.* divided into 400,000 shares of 10*l.* each of which 100,000 shares were preference shares (ranking pari passu with the existing preference shares) and 300,000 were ordinary shares. 6. By special resolution passed and confirmed on April 18 and May 3, 1901, the capital was increased by 3,000,000*l.* divided into 300,000 ordinary shares of 10*l.* each. 7. By special resolutions passed and confirmed on October 24 and November 8 1901, the above mentioned resolutions containing the definition of the rights of the preference shares were embodied in the articles of association of the company as art. 18A thereof and certain other alterations (not affecting the respective rights of the two classes of shares) were effected in the articles. Then a print of the company's articles of association as the same existed after the passing of the special resolution of 1901 was exhibited.

For some years past the company made losses on revenue account and on June 30, 1944, the debit balance on that account amounted to 1,836,538*l.* In the year ending June 30, 1945, the company made profits which enabled this debit balance to be slightly reduced to 1,627,846*l.* In the directors' opinion it would be imprudent at the present time (even assuming that it was permissible to do so before the existing debit balance on revenue account had been eliminated) to recommend payment of any dividend on any of the stock of the company. They were however advised that it was a matter of doubt whether they had any discretion to set aside profits of the company to reserve or carry the same forward in the accounts so long as dividends had not been paid at the full rate on both classes of preference stock in respect of the year in which such profits were earned and that if they had such a discretion whether such profits (or such amount thereof as is equivalent to any deficiency of such dividends) would be and remain earmarked for distribution exclusively amongst the holders of the preference stocks if and when a distribution thereof was resolved upon.

The resolutions under which the 5 per cent. preference stock was created in 1889 were, so far as material, as follows: "That "the holders of preference shares shall (subject to No. XIX. of "these resolutions), be entitled to receive in respect thereof, "out of the profits of the company for each year a fixed "dividend of 5 per cent. per annum on the amount from time "to time paid up on such shares or so much of the said dividend "as the said profits shall be sufficient to pay, in preference to "and before payment of dividends for that year on the ordinary "stock or shares of the company; but any deficiency in the "profits of any year from the amount necessary to pay the "preference dividend in respect of that year shall not be made "good out of the profits of a subsequent year; and no greater "dividend than 5 per cent. on the amount from time to time "paid up on the preference shares shall be paid in respect of "them in respect of any year. X. That no resolution of a "general meeting shall be required for the declaration of the "dividend upon the preference shares, but the board, if in their "judgment the profits for the year are or will be sufficient for "the payment of such dividend or some part thereof, shall "pay the same by two half-yearly instalments, on such

" days as they shall appoint. XII. That the holders of " preference shares shall not be entitled, in respect thereof, to " attend or vote at the general meetings of the company, " unless and until the preference dividend shall not be paid in " full, in which case they shall until payment of the full pre- " ference dividend be resumed, be entitled to attend and vote " in respect of the said shares in the same way as the holders of " the ordinary stock or shares. XIII. That so long as the " holders of the preference shares shall not be entitled to attend " or vote at general meetings, no notice of the said meetings, " nor any copy of the directors' report and accounts, shall be " sent to them; but the same shall be sent to them, as to " ordinary shareholders, if and so long as they shall be entitled " so to attend and vote. XIV. That as soon as the full " amount of the preference shares shall be paid up, they shall " be converted into stock; and the holding of such stock shall " confer similar rights to those conferred by the holding of the " preference shares. XV. That the company shall have the " right to create and issue further amounts of preference " shares of the same kind and conferring the same rights. " XVII. That any alterations of the rights of the holders of " the preference shares in respect thereof may be made by " special resolution, if consented to by a resolution passed by " three-fourths of the votes given by such of the holders of the " preference shares for the time being issued and outstanding " as shall be present at a special meeting of such holders, to be " convened and held by the board, and at which such holders " shall have one vote for every preference share held by them. " The regulations of the company for the time being as to " general meetings of the holders of the ordinary stock and " shares of the company shall apply, mutatis mutandis, to " meetings of the holders of the preference shares held under this " resolution. XVIII. That, except as otherwise provided by " or to be reasonably inferred from the preceding resolutions, " and subject thereto, the regulations of the company applicable " to ordinary shares or stock shall apply to the preference shares " or stock."

There were certain of the articles of association of the company which were in force at the time when the 5 per cent. preference shares were created in 1889, at a time when the whole of the capital of the company was ordinary. By art. 29 it was provided as follows: " The amount now standing to the credit of the " reserve fund, and such other portion (if any) of the revenues

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"of the company as general meetings may from time to time "determine, shall be set apart as a reserve fund for the purpose "of the equalization of dividends and defraying any special "or unusual expenditure, to all or any of which purposes the "board from time to time may apply any part of the reserve "fund. The board are hereby authorized to increase the "reserve fund from time to time to such amount as they shall "think fit, and for that purpose to carry to such fund for each "year such part of the undivided profits of the company from "whatever source arising, as they may think fit." Article 30: "The board may establish out of the capital moneys of the "company a fund, to be called the working capital fund, of such "amount as they shall think fit, to provide for stores in hand "and similar purposes." Article 31: "The board may from "time to time set apart out of the moneys of the company, "such sums as in their judgment are necessary to meet claims "on the company." Article 59: "Any ordinary meeting, "without any notice in that behalf, may elect directors and "auditors, and (subject as to directors to the provisions of "art. 113) may fix their remuneration; may receive, and either "wholly or partially reject, or adopt and confirm, the accounts, "balance-sheets and reports of the directors and auditors "respectively; may decide on any recommendation of the "directors of or relating to any dividend, and subject to the "provisions of these presents, may generally discuss any affairs "of or relating to the company." Article 61 provided, amongst other things, that the company shall, subject to the provisions of art. 62, "be bound by all their special resolutions under which "any shares were issued with special privileges." Article 62 made provision for resolutions altering the distinctions between the classes of shares. Article 164 was as follows: "Subject to "the provisions of the last preceding article, and of arts. 58 "and 166, all dividends on shares shall be declared by the first "ordinary meeting in each year, and shall be made only out of "the clear profits of the company, and (without prejudice to "any preferential or guaranteed dividend) no dividend shall "exceed the sum recommended to the meeting by the "directors." Article 165: "But, in order to the equalization "of dividends, payments may from time to time be made "according to these presents out of the reserve fund." Article 166: "When, in the opinion of the board, the profits "of the company permit, there shall be a dividend every half-"year, and, in order thereto, a dividend may be declared and "paid by the board by way of dividend on account in the "half year between June 30 and December 31."

T. D. D. Divine for the plaintiff company.

Gerald R. Upjohn K.C. and *Gordon Brown* for the first defendant, representing preference stockholders.

Andrew Clark K.C. and *Charles Russell* for the second defendant representing ordinary stockholders.

The arguments and authorities referred to are fully stated in the judgment.

ROMER J. (having read the material articles, and stated the facts :) Having regard to those articles, it is clear that the dividends on the ordinary capital were payable only out of the net profits of the company in the sense that the powers of the company or the board to carry profits to reserve overrode the rights of the shareholders to dividend. The procedure would be that the board would consider the profits of the company on the one hand and its requirements as to maintenance and so on on the other. Having decided the amount of profit, if any, which was available, the directors would make the necessary recommendation to the company and the company would consider the matter and decide upon it under art. 59 and a dividend would be declared under art. 164. In other words, the dividend would be payable, and payable only, out of profits available for dividend in the sense attributed to that phrase in the modern cases, as, for example, the decision of Maugham J., as he then was, in the *Long Acre Press, Ld.* v. *Odhams, Ld.* (1), in 1930. The express power to carry profits to reserve was originally, under art. 29, vested in the company in general meeting and was applicable in relation to the revenue of the company. The words there used, of course, are prima facie a very wide term. But the reference immediately following to the equalization of dividends considerably narrows the word and it may be that it was intended to mean no more than the undivided profits of the company in the next part of the article which was introduced in 1884 and which empowered the board to add to the reserve fund from that source. Such being the position, the preference capital was issued in 1889 on the terms laid down in the resolution which I have read, and those resolutions were incorporated in the new art. 18A. I need not read art. 18A because it faithfully follows for all material purposes the resolutions, except that in place of the resolution which refers to the applicability of the regulation relating to the ordinary shares, "Subject to the aforesaid regulations", sub-cl. 10 of art. 18A was introduced and is in the following terms: "Except "as otherwise provided by or to be reasonably inferred from "this article and subject thereto, the regulations of the "applicable to ordinary shares or stock shall apply to the "preference shares or stock." In the light of that clause, the position would seem to be that the company's articles as a whole were to be applicable to the preference shareholders equally with the ordinary but that the rights conferred on the preference shares by art. 18A, cls. 1 to 9, would override any regulations applicable to the ordinary shares but, subject thereto, those regulations would apply.

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(1) [1930] 2 Ch. 196.

It is therefore plain that the first thing to do is to discover what the rights conferred by cls. 1 to 9 of art. 18A on the 5 per cent. preference shares were. As to these, Mr. Upjohn's arguments on behalf of the preference shareholders were in outline as follows, that the resolutions which were embodied in art. 18A contained the terms of the bargain on which the preference shareholders put up their money. They were to be entitled to a non-cumulative preference dividend of 5 per cent. out of the profits if the directors adjudged the profits sufficient, or a less dividend if such profits were insufficient. If the dividend was paid in full they were not to be entitled to attend meetings or to receive accounts. He pointed out that if the dividend for any reason through insufficiency of profits was not paid it would never be paid and would be lost to the preference shareholders for ever. He said that those rights as thus summarized are clear down to cl. 9 and can be only diminished or altered under cl. 10. The question was whether such rights were qualified by cl. 10. Subject to cls. 1 to 9, he said the company's regulations applicable to ordinary shares should apply to preference shares. Then, as examples of articles which were excluded by virtue of cl. 10, he referred to arts. 59, 164 and 166 (those relating in effect to the decision of the company as to declaration of dividend and interim dividend) because cl. 2 of art. 18A expressly provides that no declaration is required for a preference dividend and, therefore, those three articles, though applicable to ordinary shares, were excluded from art. 18A by cl. 10. He posed the question whether the effect of art. 29, which is the reserve fund article, was to vary the clear bargain which is found in art. 18A. He said that art. 29

was applicable to the profits available for ordinary shares. With reference to art. 29, he said that the revenues of the company were the same thing as the undivided profits in the next part of the article and that they presumably meant profits available for division among the ordinary shareholders. He said that support for that view was to be found in the fact, firstly, that the fund contemplated as being carried to reserve was properly applicable for equalizing dividends by which ordinary dividends were indicated and not preference, and, secondly that the company would normally consider the position of these revenues some months after the close of the trading year during which year the directors would have been bound to pay the preference dividend out of profits, if any profits were available. Now an essential part of Mr. Upjohn's argument, as I have attempted briefly to summarize it, is that the right conferred by cl. 1 of art. 18A, or, rather, by the resolution which was passed in the terms to be found there, is a right to receive 5 per cent out of the credit balance on profit and loss account each year and is not merely a limited right to receive payment out of profits made available for dividend. The other considerations which were mentioned are auxiliary to and explanatory of this main argument.

Mr. Andrew Clark's argument on behalf of the ordinary shareholders is two-fold. He says, firstly, that it is necessary to bear in mind that in 1889 a new class of shareholders, namely the preference shareholders, was coming in for the first time, and one would expect their rights to be moulded in with the existing structure of the company's constitution so as not to disturb it more than necessary and that this element is relevant when considering the construction of the new art. 18A. In this connexion he points to the words " in preference to and before " payment of dividends for that year on the ordinary stock or " shares of the company." He contends that those words show that the profits of the company which are referred to immediately before those words mean the same profits as would otherwise have been the source of dividend on the ordinary capital. Secondly, he says that in any case on the construction of the articles as a whole " the profits of the company " in cl. 1 of art. 18A mean the profits available for dividend. On the first point Mr. Andrew Clark referred me to a decision of Branson J. in *Stewart* v. *Sashalite, Ld.* (1) [His Lordship read the headnote and referred to the judgment and continued :]

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(1) [1936] 2 All E. R. 1481.

Mr. Upjohn says that that case is not decisive of the present case because the facts were different and, indeed, so was the language. He points out that the funds indicated for payment of the sum which had to be paid to the plaintiff were to be paid from the first profits and he was merely to get a single payment and not, as the preference shareholders are to have in the present case, a series of payments, and that he was in the position of a man who had got to be paid sooner or later, whilst the preference shareholders here if they pass a dividend lose it for ever. He said that case does not govern the present case because of those and other considerations. That, of course, is perfectly true. The facts are different and the language is different, but it seems to me that Branson J.'s reasoning and decision in that case are of some assistance to me. It is said that the words " in preference to " and before payment of dividends " were merely put in to show that the ordinary shares were to be subordinate to the preference shares and that they were not intended to be indicative of a common fund. The fact that the new shares were to be superior in rights is, of course, indicated by the use of the word " preference." I myself think that, following the approach which commended itself on at all events similar words to Branson J., the phrase " in preference to and before payment " of dividends for that year on the ordinary stock or shares " of the company," does indicate the conception of competition against a common fund, that is to say the fund which was available for the payment of dividends on both classes of shares. It is not a point of construction which can in any sense be elaborated. This was a fund which, up to that time, of course, was the fund available for payment of ordinary dividend to which the ordinary shareholders alone could look and I do not think it can be said that before that fund could be utilized for the payment of that dividend this article says that it is to be utilized for the payment of preferential dividend.

If that view of the matter be right, it disposes of the question, because the funds applicable for the ordinary dividend were limited to profits available for dividend and were subject to the operation of art. 29. But I think it would be right, having regard to the argument which has been addressed to the question, for me to consider the second point which Mr. Andrew Clark relied upon, and this again is a question of construction but of a rather wider scope. Firstly, I should mention a small point which, though small, seems to me not without significance. As I have already indicated, the dividends on the ordinary shares were payable and are payable out of profits available for dividend. Those profits were defined in art. 164 as being "the "clear profits of the company." The word "clear" was omitted from art. 166, which relates to interim dividend, but by reason of the restriction in art. 164 the word "profits" in art. 166 obviously means the same thing as "clear profits" in art. 164, that is to say profits available for the payment of dividend. Now art. 166 was for this purpose, although it contained certain words which were subsequently deleted, in being when the preference shares were created in 1889 and it formed part of the constitution of the company. The phrase "the profits of the company" in art. 166 was repeated in the new art. 18A, and if the meaning of that phrase in art. 18A is doubtful I should myself think that assistance in its interpretation would be forthcoming from art. 166 where the meaning is clear and would afford a strong indication in itself that in art. 18A "the profits of the company" meant the clear profits of the company, or, in other words, the profits available for dividend.

Apart altogether from that point, however, Mr. Andrew Clark contends that where articles provide that a dividend is to be paid out of profits it does not mean any profits whatsoever but prima facie means out of profits that are available for dividend. One case to which he referred me on that question was the case of *Dent* v. *London Tramways Company* (1). That was an action against the tramway company by the preference shareholders of the company and it came before the Master of the Rolls in 1880. But the year previously there had been another action against the company on behalf of the general body of shareholders. That action, which was the action of *Davison* v. *Gillies*, is referred to in a note in 16 Chancery Division at p. 347. It came on by way of motion for an injunction in effect to restrain the directors from paying dividends out of capital. [His Lordship referred to the judgment in that action and proceeded :]

Then, I think in the following year, the preference shareholders sued the company. The headnote in the report says (1): "The articles of association of a limited tramway company "provided that no dividend should be declared except 'out "'of profits'; that the directors should, with the sanction of "the company, declare annual dividends 'out of profits'; "and that the directors should, before recommending a

(1) (1880) 16 Ch. D. 344.

" dividend, set aside ' out of profits,' subject to the sanction " of the company, ' a reserve fund for maintenance, repairs, " ' depreciation, and renewals.' The company had for several " years carried on their business, paying a dividend half-yearly " on their ordinary shares ; but they failed to set apart a reserve " fund adequate for the maintenance of their tramway, which " eventually became worn out. The company having again " declared a half-yearly dividend on their ordinary shares, and " the total sum appropriated for the dividend being, as it " appeared, much less than the sum required to reinstate the " tramway :—Held, that the company could only declare a " dividend out of the net profits, and that the net profits could " not be ascertained without first restoring the tramway to an " efficient condition, or making due provision for that purpose " out of the company's assets. An injunction was accordingly " granted restraining the company from paying the half-" yearly dividend they had declared, but leave was given them " to move to dissolve the injunction, in the event of their being " able to satisfy the court that there were profits available for " the dividend : Held, however, that the holders of preference " shares, the dividend on which was ' dependent upon the profits " ' of the particular year only,' were entitled to a dividend out " of the profits of any year after setting aside a proportionate " amount sufficient for the maintenance of the tramway for " that year only ; and were not to be deprived of that dividend " in order to make good the sums which in previous years should " have been set aside by the company for maintenance, but " which had been improperly applied by them in paying " dividends." Sir George Jessel M.R., in his judgment, after referring to his decision on the motion which he said had apparently been misunderstood, said this : " However, the " present question is, to my mind, a very simple one. There is " a bargain made with the company that certain persons will " advance their money as preference shareholders ; that is, " that they shall be entitled to a preferential dividend of " 6 per cent. over the ordinary shares of the company, " ' dependent upon the profits of the particular year only.' " That means this, that the preference shareholders only take a " dividend if there are profits for that year sufficient to pay " their dividend. If there are no profits for that year sufficient " to pay their dividend they do not get it ; they lose it for ever " and if there are no profits in one year, and 12 per cent. profit " the next year, they only get 6 per cent., and the other 6 per

" cent. goes to the ordinary shareholders. So that they are, " so to say, co-adventurers for each particular year, and can " only look to the profits of that year. What happened was " this. The company improperly allowed their tramways to " get out of repair, and paid away their receipts to the ordinary " shareholders in the shape of dividends. The result was that " on January 1, 1878, the tramways were very much out of " repair, and wanted a large sum to put them in a proper state " of efficiency. Notwithstanding that, the company did work, " and they earned a good deal of money, the profits for the year " 1878 being upwards of 14,000*l.*; and the dividend required " being only 6 per cent. on 80,000*l.*, it is quite clear that they " earned more than sufficient to pay the preference share- " holders, supposing these were fairly-earned profits. To see " that they were fairly-earned profits, I must look at the report, " which I have before me, of an eminent accountant, " Mr. Waddell, who says they were. He says, in effect, that " considering the state of the line on January 1 and the state of " the line on December 31, in that year, after setting aside " sufficient to make good the wear and tear for that particular " year, and paying all expenses, there was a net balance of " 14,932*l.* That is admitted by the twentieth paragraph of the " statement of defence, which says, ' If a proper proportionate " ' amount had been charged against the revenue of the year " ' 1878 for such maintenance, etc., as aforesaid, the accounts " ' would have shown, as the fact is, that there was a balance of " ' revenue, and in that sense a net profit in that year of only " ' 14,932*l.* 5*s.* 4*d.*' Therefore if ' profits for the year ' have any " meaning at all, these were the profits for the year. ' Profits " ' for the year ' of course mean the surplus in receipts, after " paying expenses and restoring the capital to the position it " was in on January 1 in that year. I have had the advantage " of having Mr. Waddell present in court, and ascertaining from " him that his report in the sense I have stated is expressed " according to his meaning, and that there is no mistake in the " admission in the defence; that is to say, there was an actual " net profit for that year of upwards of 14,000*l.* Then what " is there to argue? The argument for the company amounts " to this, that inasmuch as they have improperly paid to their " ordinary shareholders very large sums of money which did not " belong to them, they, the company, are entitled to make good " that deficiency by taking away the fund available for the " preference shareholders to an amount required to put the

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"tramway in proper order. When the argument is stated in "that way, it is clear that it cannot be sustained. The "company either have a right to recover back from the ordinary "shareholders any sums over-paid or not. If they have a right, "they must recover them; if they have no right to recover "them, a fortiori they have no right to recover them from the "preference shareholders, and, of course, still less right to take "away the dividends from the preference shareholders." Then he says there appears to be a misconception of what he was supposed to decide on the former occasion. I think that case is of some interest apart altogether from the fact that the undertaking of the company was of a similar character in some respects to the undertaking of the plaintiff company here. But it seems to me reasonably clear that Sir George Jessel M.R. both on the motion and in the action, decided that the profits of the company for dividend purposes meant profits after setting aside for depreciation but so far as the preference shareholders were concerned not arrears of depreciation. I think it is clear that in the first year, for example, of the company's business the profits available for the preference shareholders as for the ordinary shareholders would have been only the profits of the first year less the amount required to meet the depreciation which the undertaking during that period had suffered.

Then comes the case of *Fisher* v. *Black and White Publishing Company* (1). [His Lordship read the headnote and continued:] Vaughan Williams and Romer L.JJ. confined themselves to considering the proper meaning of the phrase "profits "available for dividend," which Rigby L.J. also considered, but Rigby L.J., in addition, said this, after comparing the language used in the memorandum with the language used in the articles and noting their difference: "It would "be idle, I think, to suppose that there was a deliberate "intention to lay down a rule for the division of profits different "from that contained in cl. 5 of the memorandum. I should "rather assume, and I do so without much difficulty, that it was "intended to lay down the ordinary rule, and that when it is "provided that a dividend of a specified amount shall be paid "'out of the profits,' that did not mean that it should be paid "out of any profits whatsoever, but only out of those profits "that were available for dividend." That view, although not repeated by the other Lords Justices, was not commented on by them and justifies me in my view as regarding it as an authority.

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(1) [1901] 1 Ch. 174.

It is said that Eve J. came to a different conclusion in the case of *Evling* v. *Israel & Oppenheimer, Ld.* (1). In that case by cl. 6 of the memorandum of association of the company it was provided that " The profits of the company in " each year shall be applicable as follows: First: in payment of a " cumulative preferential dividend at the rate of 7*l.* per cent. fixed " per annum on the capital for the time being paid up on the " said preference shares. Second: in payment of a cumulative " dividend at a rate not exceeding 2*s.* per share on the capital " for the time being paid up on the said ordinary and ' B ' " shares rateably, without any preference or priority between " such shares, and irrespective of the difference in the nominal " value of such shares. Thirdly: the surplus (if any) shall be " carried and credited to a reserve fund until such reserve fund " shall amount to the sum of 25,000*l.* Fourthly: subject as " aforesaid, and to the provisions of art. 126 of the articles of " association, the ordinary shares shall confer on the holders " thereof the right to one moiety, and the ' B ' shares shall " confer on the holders thereof the right to the other moiety " of the profits, or other moneys of the company available for " dividend, which it shall from time to time be determined to " distribute." By art. 126 it was provided that " The directors " shall set aside out of the profits of the company such sum as " is provided for by sub-s. 3 of cl. 6 of the memorandum of " association of the company, and may, before recommending " any further dividend under sub-s. 4 of the same clause, set " aside out of the profits of the company such sum as they think " proper as a further reserve fund, which shall at the discretion " of the directors be applicable for meeting contingencies, for " the gradual liquidation of any debt or liability of the company " or for repairing or maintaining any property of or works " connected with the business of the company, or shall, with " the sanction of the company in general meeting, be, as to " the whole or in part, applicable for special dividends, or for " equalizing dividends, for distribution by way of bonus among " the members of the company for the time being, on such terms " and in such manner as the company in general meeting " shall from time to time determine. . . . The directors may " also from time to time carry forward such sums as may be " deemed expedient in the interests of the company." It was

(1) [1918] 1 Ch. 101.

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in relation to those provisions that Eve J. had to decide the rights of the holders of the ordinary and " B " shares. He said " It is, I think, conceded by the company—but if not conceded " I hold that the profits referred to in the opening sentence of " cl. 6 of the memorandum are the profits arising from the " carrying on of the company's business—in other words, the " credit balance in each year's profit and loss account. Not " only is this the primary meaning of the words, but in the " concluding paragraph of this very clause the words are " repeated with the addition 'available for dividend': a " qualification which clearly shows that where the words are " used without it they mean something more than profits " available for dividend. The clause therefore deals with the " application of the company's profits in the wider sense I have " indicated: see *Fisher* v. *Black and White Publishing* " *Company* (1)." I thought at first that Eve J. might be intending to lay down in general terms that where you find the phrase " profits of the company " in conjunction with the payment of a dividend the prima facie meaning of such words is the credit balance in each year's profit and loss account. But I do not think on considering the matter further that he intended to lay down any such principle but was confining his observations to the question which arose before him in the case and to the provisions of the memorandum and articles of association on which the question before him depended. Not only is there the contrast between the use of the words, " the profits of the " company " in one part of cl. 6 of the memorandum and " the moneys of the company available for dividend " in the other, but also there is the very noticeable fact that by the provisions which he was construing the third specified application of the profits was to carry to reserve under art. 126 up to a certain amount and under art. 126 that power was extended so as to enable the directors to reserve the stated amount before paying the final class of recipient any surplus of income. It would be difficult, I think, to arrive at any other conclusion than that expressed by Eve J. on the meaning of the words "profits of the company" in that particular case and having regard to those particular provisions, namely, that it meant the credit balance to profit and loss account. Therefore, up to that point, I should conclude that the " profits of the company " in cl. 1 of art. 18A meant profits available for dividend, in which case there would, of course, be no ground for excluding art. 29 by reason of cl. 10 of art. 18A. But Mr. Upjohn relied on

(1) [1901] 1 Ch. 174.

certain other indications in support of the wider meaning of profits for which he contends. Firstly, he says that one of the purposes to which the reserve fund can be put is equalization of dividends, and he said, and truly said, that such an application of profits would benefit only the ordinary shareholders. It is to be observed that in *Fisher* v. *Black and White Publishing Company* (1), to which I have already referred, where the preference shares which were under consideration were non-cumulative preference shares, that point was also taken and Romer L.J. said this: " But it is right to say that as at " present advised I think that cl. 74 is modified to some extent, " for in my view it could not be used for the purpose of creating " a reserve fund to be applied in equalizing dividends. That is " my present view, though I do not express any concluded " opinion about it, because the question is not now before us. " But I point that out because otherwise it might be supposed " that cl. 74 could be used so as to cause what might be an " injustice as between the owners of the founders' shares and " the owners of the ordinary shares." Exactly the same point was taken for the same purposes and was dealt with rather more succinctly by Farwell J. in *Bond* v. *Barrow Haematite Steel Company* (2): " It was urged that art. 97 providing for the " reserve fund cannot apply to preference shares, because one " of its objects is to equalize dividends; but I cannot see that " the mention of one object which is not applicable is any " reason for excluding those objects which are applicable, " and which are really for the benefit of all the shareholders. " On the articles as they stand, I have no doubt that the true " construction is that which I have stated." So here, of course, the reserve fund is applicable to purposes which are beneficial to the company as a whole, including the preference stock, and it appears to me that the reasoning of Farwell J. is equally relevant to this point of objection (and I respectfully adopt it) the reason being that the mention of one object which is not applicable is not a reason for excluding those objects which are applicable.

The next point is this. It is said that arts. 59 and 164, which relate to decision and declaration by the company of dividend, are excluded by cl. 10 of art. 18A. That is quite true; they are. It is then argued that this shows that the payment, of the 5 per cent. dividend is a matter of contractual right in that no declaration of dividend is required. I think an answer

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(1) [1901] 1 Ch. 174.

(2) [1902] 1 Ch. 362.

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to that is this, that cl. 2 of art. 18A does not profess to dispense with a declaration of dividend, which is in relation to preference shares just as necessary in general as it is in relation to ordinary shares. That that is so was also stated by Farwell J. in the case to which I have just referred on the other point of *Bond* v. *Barrow Haematite Steel Company* (1). He said : " It is argued " that the provisions as to the declaration of a dividend do not " apply to shares on which a fixed preferential dividend is " payable. In my opinion this is not so. The necessity for the " declaration of a dividend as a condition precedent to an action " to recover is stated in general terms in Lindley on Companies, " 5th ed., p. 437, and, where the reserve fund article applies, " it is obvious that such a declaration is essential, for the share- " holder has no right to any payment until the corporate " body has determined that the money can properly be paid " away. It is urged that this puts the preference shareholders " at the mercy of the company, but the preference shareholders " came in on these terms, and this argument does not carry " much weight in an action such as this, where bona fides is " conceded. The opposite conclusion might enable the " preference shareholders to ruin the company, and would " certainly lead to great inconvenience in enabling them to com- " pel the payment out of the last penny without carrying " forward any balance." That, admittedly, was a case where preference shares were cumulative. But, as I say, cl. 2 of art. 18A does not, in my view of the matter, as a question of construction, dispense, at all events by express terms, with the declaration of a dividend at all. All that it does dispense with is the need for a declaration by the company in general meeting. The declaration, so far as the dividend on the preference shares is concerned, is delegated to the board. The language of cl. 2 of art. 18A is : " No resolution of a general meeting shall be " required for the declaration of the dividend upon the " preference shares." It is to be noted there, apart from the fact that it does not say that no declaration of a dividend shall be required but that no resolution of a general meeting shall be required, it is not in relation to a declaration of dividend but the declaration of the dividend on the preference shares. I cannot myself attribute very much weight, therefore, to that argument. Then reliance is placed upon the phrase, " but the " board, if in their judgment the profits for the year are or will " be sufficient for the payment of such dividend or some part

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(1) [1902] 1 Ch. 362.

"thereof, shall pay the same by two half-yearly instalments, on "such days as they shall appoint." It is said that this shows that the directors are only concerned with actual profit after necessary expenses and contingencies have been provided for and that it is followed by the imperative words "shall pay." It is argued that it was the board's duty to have paid two half-yearly preference dividends long before the fund available for ordinary dividend is or could be ascertained. Although, of course, this argument is dependent on the view that art. 18A (I.) has already conferred on the preference shareholders the contractual right contended for as has already appeared, I do not think it does confer such a right. In any case I think the argument puts too much weight on the word "judgment," which means, I think, no more than the word "opinion" in the parallel art. 166.

On the whole, and for the various reasons which I have indicated, I have come to the conclusion that the rights conferred by art. 18A are not such as to displace the operation of art. 29, that the two can quite consistently be read together, that the preference shareholders were not given a contractual right to be paid a preference dividend out of the balance on profit and loss account in each year but only out of the profits which are available for dividend in the sense indicated in the cases of *Black and White Publishing Company* (1) and *Long Acre Press, Ld.* v. *Odhams, Ld.* (2).

The 6 per cent. preference shares I think I can deal with very summarily. The first issue, I think, was made in 1925. Their rights to all intents and purposes are the same as the 5 per cent. to which they are subject, and it was, I think, conceded that if I came to a conclusion adverse to the holders of the 5 per cent. preference shares on this question, then that decision would be equally applicable to the 6 per cent. preference shares.

Solicitors: *Linklaters & Paines; Bischoff & Co.*

(1) [1901] Ch. 174. (2) [1930] 2 Ch. 196.

H. L. L.

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Mar. 17, 18.

In re HOLLIDAY, DECD.: HOUGHTON *v.* ADLARD.

Settlement—Will—Capital and income—Trust for sale of residuary estate —Power to postpone conversion—Fund vested in trustees of will subject to discretionary trust as to annual income or any part thereof —Whether fund apportionable as between tenants for life and remainderman.

A testator by his will gave his residuary estate upon trust for sale with full power to postpone conversion, and subject to an annuity to his wife directed his trustees to hold the proceeds upon certain trusts for his nieces for life, and then for their issue equally, subject to powers of appointment and in default of such issue to a charity. The will excluded the operation of the rule in *Howe* v. *Lord Dartmouth.* He died in 1927, and his widow in 1939. His estate comprised interests arising under a settlement of 1895 and the will of his father who died in 1898, by which property was settled upon his brother C. for his life and then to C.'s issue, and in default of such issue to the testator and another, subject to a proviso that it should be lawful for the trustees of the settlement and will respectively to pay the whole or any part of the income of the settled funds to or for the benefit of any wife of C. who should survive him during her life or any shorter period as the trustees might in their discretion think fit. C. died without issue in 1899, leaving a widow who survived him until 1942. The trustees paid part of the income of the settled funds to her without deduction of tax until 1939, and after 1939 the whole of such income. The testator's trustees now received invested funds amounting to 14,415*l.* from the trustees of the settlement and the father's will, and the question was raised whether this was wholly capital or ought to be apportioned as between capital and income on the principle of *In re Earl of Chesterfield's Trusts* (1883) 24 Ch. D. 643, and if so, in what proportions :—

Held, that the interest of the testator in the settled funds at the time of his death was not a reversionary interest, but an absolute interest, the income of which was temporarily charged in favour of a third person, but subject thereto was paid to him, and therefore no question of apportionment as between capital and income arose, and the whole must be treated as capital. *Rowlls* v. *Bebb* [1900] 2 Ch. 107 distinguished.

ADJOURNED SUMMONS.

The testator, James R. Holliday, by his will, dated January 24, 1922, gave his residuary estate to his trustees on the usual trusts for sale and conversion and out of the proceeds to pay debts and legacies, and subject thereto to hold the proceeds upon the trusts therein declared. After directing the payment of an annuity to his wife, and other dispositions, he directed his trustees to hold the proceeds of his residuary estate as to one-third part thereof upon trust to pay the income thereof to certain named nieces and the survivors and survivor of them during their respective lives, and upon the death of the survivor the one-third share as well capital as income was given to the trustees of the Public Picture Gallery Fund, Birmingham. The testator then directed his trustees to hold one other third part of the proceeds of his residuary estate as to one-half thereof in trust for a named niece, and as to the other half in trust for another named niece, and subject as aforesaid the remaining one-third part on trust to pay the income to a sister for life—since deceased – and from and after her decease he directed his trustees to stand possessed of the same one-third part, capital and income, as to one-half in trust for a daughter of that sister, and as to the other half for another daughter of that sister, and he settled the shares of the nieces in his residuary estate on trust for themselves for life, and then for their issue, and subject to a power of appointment over one half of each share, in default of issue the Public Picture Gallery Fund, Birmingham, was to take each share. The trustees were empowered to postpone for such period as they should judge expedient the sale conversion and getting in of the estate, and to retain investments. By cl. 20 the testator declared that the dividends interest and other yearly produce of his estate to accrue after his death and until the actual sale conversion and getting in thereof should be deemed the income thereof applicable as such for the purposes of the said trusts without regard to the amount of such income or to the wasting or hazardous nature of the investments. The testator died on July 22, 1927, and his widow, to whom he bequeathed an annuity, died on January 2, 1939.

Included in the testator's residuary estate were the following interests, namely: (A) His beneficial interest under a settlement dated April 8, 1895 and made between his father, the testator, and other persons, under which the father settled a fund (therein called "Charles Fund")—Charles was a brother of the testator—" on trust for the benefit of Charles and others " during the life of Charles and after Charles' death (in the " event which happened of his leaving no child) in trust for " the testator and his brother Frank absolutely in equal shares " with a proviso " that it should be lawful for the trustees of the " settlement if they in their absolute discretion thought fit " to pay or apply the annual income of the whole of any part of

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"Charles Fund to or for the benefit of any wife of Charles who "should survive him during the residue of her life or during such "shorter period as the trustees might in their absolute discretion think fit." (B) His beneficial interest under the will and codicils of the father (who died on March 12, 1898) whereby part (therein called Charles Fund) of the proceeds of sale and conversion of the father's residuary trust estate were directed to be held on trusts after the death of Charles for his children and in default of children for the testator absolutely with a proviso (in similar terms to the proviso in the settlement) in favour of any widow of Charles. Charles died on April 7, 1899, without issue, but leaving a widow, namely, Mary Holliday, him surviving; who died on October 30, 1942, having received for some years 100*l.* without deduction of tax from Charles Fund under the settlement, and 300*l.* without deduction of tax from Charles Fund under the father's will and codicils; but after the year 1939 she received the whole income of Charles Fund under each of the settlement and the father's will and codicils, this being less than the 100*l.* and the 300*l.* Half Charles' share under the settlement and all Charles' share under the father's will (less duties and costs) had now been received by the plaintiffs and were of the respective values at the date of transfer of 11,549*l.* 2*s.* 11*d.* and 2,866*l.* 5*s.* and were constituted by the investments respectively specified in an exhibited document.

The question was whether these sums were wholly capital or whether they ought to be apportioned between capital and income, and if so, in what proportion.

G. D. Johnston for the plaintiffs.

J. Arnold (*Fawell* with him) for tenants for life. The property was retained unconverted until it fell into possession, and as it partly consisted of non-trustee securities it should have been converted. The money now in the hands of the trustees is not wholly capital, but partly income, and it should be apportioned as between capital and income: *Rowlls* v. *Bebb* (1). The trustees never exercised their discretion to convert. It may be true to say that this is not really a reversionary interest, but it is so similar to one that *In re Earl of Chesterfield's Trusts* (2) is applicable, and it is not excluded merely because the rule in *Howe* v. *Earl of Dartmouth* (3) is excluded. The interest

(1) [1900] 2 Ch. 107.
(2) (1883) 24 Ch. D. 643.
(3) (1802) 7 Ves. 137.

became a reversionary interest as soon as the trustees decided in their discretion to pay the income, or the bulk of it to Charles' widow. From 1939 on the income was smaller and the trustees paid the whole of it to Charles' widow. The rules in *Howe* v. *Earl of Dartmouth* (1) and *In re Earl of Chesterfield's Trusts* (2) should apply if the power to postpone conversion is not exercised. The tenants for life of the estate of the deceased tenant for life ought to account to the trustees for income which is more than they should have received. He referred to *Allhusen* v. *Whittell* (3) and *In re Parry* (4).

Goff for the remainderman. This is not a case to which the decision in *In re Earl of Chesterfield's Trusts* (2) has any application, because this is not a real reversionary interest, but a present absolute interest subject to an annual but variable charge on the income. The interest produced a substantial income and the whole of it was not paid to Charles' widow, but part of it to the tenants for life under the testator's will. The trustees, if they ever considered the matter, might well have decided to retain the existing investments. The decision in *Rowlls* v. *Bebb* (5) does not apply.

ROMER J. (after stating the facts). The question in relation to these funds arises as between tenant for life and remainderman and is whether those funds ought to be apportioned so as to give something in the nature of income to the income beneficiaries under the testator's will, or whether the whole amounts ought to be treated as capital, and what principle should be applied if an apportionment is required.

It is argued on behalf of those interested in income under the trusts of the testator's will that an apportionment of these funds which have now come to the hands of the trustees should be effected in accordance with the decision in the well-known case of *In re Earl of Chesterfield's Trusts* (2) and the kind of principles which it is said are relevant to the present case are stated thus at pp. 1203 and 1204 of Jarman on Wills: " In " most cases, however, the testator gives the trustees a dis- " cretionary power of sale, or power to postpone conversion, " and then the tenant for life cannot compel a realization of the " property so long as the trustees, in the proper exercise " of their discretion, think fit to keep it unconverted; in

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(1) 7 Ves. 137.
(2) 24 Ch. D. 643.
(3) (1867) L. R. 4 Eq. 295.
(4) Ante p. 23.
(5) [1900] 2 Ch. 107.

"such a case the tenant for life gets nothing until the property "falls into possession or is sold; but he may have a right to "an apportioned part of the fund when it falls into possession ". . . . In such a case as that above referred to, where "conversion ought to have taken place, either because there "was no power to postpone, or because the power was not "exercised or improperly exercised, it becomes necessary to "determine what portion of the property belongs to the tenant "for life or his representatives." Those passages are referring to reversionary or other interests not producing income, and the leading case on the subject of reversionary interests is *Rowlls* v. *Bebb* (1). Those principles were applied by the Court of Appeal in that case in this sense, that they were satisfied there that the trustees had not in fact exercised a discretion as to whether to retain or to realize a reversionary interest which formed part of the testator's estate; and the court also came to the conclusion, having regard to the considerations which were disclosed in evidence, that it would not have been proper for the trustees to have exercised their discretion in favour of retention. There it was held that the reversionary interest, notwithstanding a clause in the will somewhat resembling cl. 20 in the will in the present case, ought to be apportioned (when it fell into possession) as between tenant for life and remainderman in accordance with the principle of *In re Earl of Chesterfield's Trusts* (2). As I say, the argument advanced on behalf of the income beneficiary in the present case is that such an equity is similarly applicable here, and should be applied.

The first thing to do, I think, in order to arrive at a conclusion on this subject is to see precisely what the interest of the testator was in the two Charles Funds at the time of his death in the summer of 1927. His brother Charles had died in 1899, and died without issue, but his widow was still alive. That being so, one looks at the settlement of 1895 in order to see what the interest of the testator's estate was at the time of his death. The position then was that the settled property was held in trust for the testator and his brother Frank absolutely in equal shares, but subject to a proviso that it should be lawful for the trustees of that settlement if they in their absolute discretion should think fit so to do, "to pay or apply the annual income of the "whole or any part of Charles Fund or so much thereof as shall "not have been so applied as aforesaid to or for the maintenance

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(1) [1900] 2 Ch. 107.

(2) 24 Ch. D. 643.

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"support and benefit of any wife of the said Charles Holliday "who shall survive him during the residue of her life or during "such shorter period as the trustees may in their absolute "discretion think fit." The interest of the testator under the other Charles Fund was the same, save only that he had a sole interest in that fund, by which I mean that it was not shared by his brother Frank or by anyone else. Consequently he had, during his lifetime and at all periods subsequent to the death of his brother Charles, and his estate had at the time of his death and subsequently, an absolute interest in income-bearing property; and the only barrier between himself whilst he was alive and his estate after he was dead, separating him from receipt of that income and of the funds themselves, was the power of the trustees of those funds to divert some or all of the income, in their discretion from time to time to the maintenance support and benefit of Charles' wife so long as she remained alive. It seems to me clear that that interest was not a reversionary interest in any true sense of the word at all. It was an absolute interest, but the income was temporarily charged in favour of a third person. In my view there is no justification for holding that the equity which has long since been applied to reversionary interests in the strict sense—namely, interests which are wholly in reversion and bringing in no income to the estate—should be applied to an interest of that character for the purpose of adjusting the rights as between the tenants for life and remaindermen, that equity having no application in my judgment to an income-bearing fund which is absolutely and immediately vested and subject only to a charge imposed on the income for the benefit of a third party.

Mr. Arnold, who appeared on behalf of the income beneficiaries, conceded that the interests of the estate in the two Charles Funds were not truly reversionary interests; but, he said, they were the kind of interests which sufficiently justified and ought to attract an application of the same principle in order that justice might be done between the income beneficiaries on the one hand, and the capital beneficiaries on the other. Mr. Arnold contends that these funds ought to be apportioned on the *Chesterfield* basis, but that the amounts which have been received by way of surplus income since the testator's death and paid to the income beneficiaries must be brought into account against the proportion of the sum which would be allocated to income on the *Chesterfield* (1) calculation.

(1) 24 Ch. D. 643.

As to this, I would only observe that the method of bringing such sums into account (with interest) would seem to give rise to difficult questions and somewhat intricate calculations. Mr. Goff, on the other hand, argues that that kind of principle has no application to an income-bearing fund of this nature, and that this must be treated as a case of an income-producing fund subject to an annual charge on income; and that accordingly, in such cases as that, the rule applicable is the rule that a tenant for life must keep down, or at all events submit to, all annual charges on income; and that the income beneficiaries, having received income since the testator's death, are entitled to keep it by virtue of cl. 20 of the will, and that that is the beginning and end of the matter—that no question of apportionment or necessity for apportionment arises because there is no equity which demands any such interference with the ordinary course of administration as laid down in the testator's will itself.

I accept that view of the matter. I do not propose in this judgment to go into any further consideration of the decision in *Rowlls* v. *Bebb* (1) or the cases which preceded it; they were cases of non-income-bearing reversionary interests which, as such, fell to be apportioned. I do not regard these as non-income-producing reversionary interests at all; and it seems to me that as they produced income and were immediate interests subject only to an annual charge on income there was nothing for the trustees to direct their minds to at the date of the testator's death from the point of view of inquiring whether they should sell, or whether they should retain. Their interest in the funds was not reversionary, and the fact that some income might be diverted to a third party does not attract an inquiry of that kind. No authority in point was cited, and, so far as I am aware, no authority precisely in point exists. The case of *In re Darby* (2), was referred to, but I think only for purposes of comparison. In that case a father gave to his daughter an absolute interest in his estate, but subject to an annual sum charged on the estate in favour of the girl's mother, namely, the testator's widow; she inherited that estate on those terms, and then she made her own will and charged her residuary estate with an increased annuity in favour of her mother. The question arose on her death, leaving her mother surviving (inter alia), whether the doctrine of *Allhusen* v. *Whittell* (3) should be brought into play or not in relation to payments to be made to the mother. I think the only point sought to be made on that authority was that it did not apparently occur to anyone to regard the daughter's interest in her father's estate as being a reversionary interest in any sense of the word, but it was treated as an absolute interest in possession, subject only to a charge upon income. The case was used merely as a matter of comment, and not as an authority on the question which I have to decide.

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(1) [1900] 2 Ch. 107.

(2) [1939] Ch. 905.

(3) L. R. 4 Eq. 295.

I decide this case on this short ground: that these were absolute interests subject only to a charge upon income; that the tenants for life of the testator's estate got such income as was available from time to time, and were and are entitled to retain it; that their rights in relation to the funds are limited to that, and extend no further; that this is not a case of a reversionary interest in respect of which the principle recognized and applied in *Rowlls* v. *Bebb* (1) operates; and consequently no question of apportioning the sums which are now in the hands of the trustees arises. I will declare that the sums received by the plaintiffs on the death of Mary Holliday—that is to say, the widow of the testator's brother Charles—as representing both the Charles funds ought to be held and applied as capital under the will and codicil of the testator.

Solicitors: *Emmet & Co., for Wragge & Co., Birmingham,* for all parties.

(1) [1900] 2 Ch. 107.

H. L. L.

In re 36, 38, 40 AND 42, JAMAICA STREET, STEPNEY.

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Mar. 17, 18; April 25.

Lord Greene M.R., Cohen and Asquith L.JJ.

War damage—Reinstatement—Cost of work—walls previously in bad condition—Rebuilding made necessary by bombing—Amount payable by War Damage Commission—War Damage Act, 1943 (6 & 7 *Geo.* 6, *c.* 21), *s.* 2, *sub-s.* 1, *ss.* 6 *and* 7, *s.* 8, *sub-s.* 2.

The blast from a bomb dropped by an enemy aeroplane structurally damaged the front walls of four houses and the walls which were previously in a bad condition had to be rebuilt in whole or in part. The War Damage Commission decided that as the walls were previously in a bad state, the proportion of the cost of the work to be borne by them as being attributable to war damage was in each case 40 per cent., afterwards reduced to 33½ per cent., *Held* (affirming the decision of Vaisey J. ante p. 158) that in the absence of any evidence that the walls would have fallen down within any reasonable distance of time, if they had been uninjured by enemy action, the Commission were responsible for the whole cost of the work, since the damage making necessary the rebuilding was the " direct result " of enemy action within s. 1, sub-s. 1, of the War Damage Act, 1943.

The question whether in some other case there could be evidence to justify an apportionment of the cost of work must be kept open.

APPEAL from Vaisey J. (1).

Brigadier D. A. S. Browne and two other persons were the owners of Nos. 36, 38, 40 and 42, Jamaica Street, Stepney, and a large number of neighbouring houses. During the war a bomb fell on the opposite side of Jamaica Street and caused injury to the four houses which seriously affected the stability of the front walls. These walls were in a bad condition before the bomb fell but the defect in them was so accentuated by blast that they had to be rebuilt to the extent of three-quarters of two of them and the whole of the other two. The War Damage Commission (hereafter referred to as the Commission) came to the conclusion that as the walls were defective before the bombing the proportion of the proper cost to be borne by the Commission as war damage under the War Damage Act, 1943, was 33⅓ per cent. The owners appealed by way of notice of motion and the Commission therefore stated a special case in which the correspondence between the parties was set out and in para. 3 (*h*) a report on Jamaica Street houses (adopted by the Commission) of a technical officer made after discussion with the clerk of the works to the owners' agents. This report stated the facts substantially as already set out and continued: " As the walls were defective prior to the bombing, the pro-" portion of the proper costs to be borne by the Commission " has been agreed by us as detailed in the schedule." The extent of the damage to a number of houses in the road and the proportion of the costs to be borne by the Commission was set out, that in respect of each of the four houses being 40 per cent. In conclusion the report said that in view of the rebuilding required by houses Nos. 26 to 50 (even numbers) " the Commission should be responsible for a third of the full " costs of these structural repairs in addition to other superficial " reinstatement necessary."

Vaisey J. held that the damage necessitating the work of reinstatement was "the direct result of action taken by the "enemy" within s. 2, sub-s. 1 (*a*) of the War Damage Act, 1943, the explosion of the bomb being the proximate and immediate cause of the damage and not merely a contributory cause. The Commission must therefore bear the whole of the proper costs of the works executed for making good the damage to the four houses.

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(1) Ante p. 158.

The Commission appealed.

Sir Hartley Shawcross A.-G., Michael Rowe K.C. and *Danckwerts* for the Commission.

This is a case where repair became necessary from two causes (1.) the state of disrepair of the walls before the bombing took place, and (2.) bomb damage. The Commission has always adopted the practice in such cases of paying only part of the cost of works namely, what they are able to find as a fact was the cost of works due to war damage. The liability under the War Damage Act, 1943, is to pay the cost of making good war damage and the question arises when it cannot be made good without also making good the previous state of disrepair. Thus there may be a case where shrapnel has dislodged a few tiles from a roof and the roof is found to be in such a bad state that the tiles cannot be replaced without repairing the whole roof; or a case where a window is blown out by blast and it is found impossible to put in fresh glass without making good the frame owing to its rotten state; or a case where blast widens an existing crack. It is reasonable in such cases, as it is in the present case, for the Commission to pay only part of the cost of work, for where new walls had recently been erected they stood up to the blast and there was no need to take them down and rebuild. This is the first time when the practice of paying for only a part of the cost of works in such cases has been questioned. Whether this practice is justified depends on the Act. [They referred to s. 2, sub-s. 1; s. 5, sub-s. 2] s. 6, sub-s. 1; s. 7, sub-s. 1; and s. 8, sub-ss. 1, 2 and 4.

Section 8 is the important section and it is concerned solely with the maximum payable as cost of works. It is a fallacy to say that the whole cost of works is to be paid as war damage. Section 123 contains definitions of "making good" and "proper cost," and sch. III. contains three headings giving three kinds of deduction that can be made. The fact that the injury to a building is a "direct" cause of war damage does not exclude the existence of other direct causes: *Weld-*

Blundell v. *Stephens* (1); *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* (2). Direct cause has the same meaning as "proximate cause." [Lord Greene M.R. Can it be said that the state of the front walls before the bombing would have made rebuilding necessary?] Here some of the walls on the estate had been rebuilt before the bombing happened. The case against the present appeal is *Minister of Pensions* v. *Chennell* (3) where *Greenfield* v. *London & North Eastern Ry. Co.* (4) was not followed by reason of the decision in *Adams* v. *Naylor* (5). In *Chennell's* case (3) Denning J. said that where the discharge of a missile caused injury it was immaterial that there were other causes. In *Adams* v. *Naylor* (5) the *Greenfield* case (4) was not mentioned and Denning J. was not justified in treating it as overruled. The War Damage Commission is only required to pay the proper cost of making good the actual war damage. In this purpose the Commission has to determine the damage directly attributable to war damage. It is not to be assessed by the extent of the work needed to put matters right when the damage is in part due to extraneous causes. That is the effect of s. 8 of the Act. It follows that the question whether the work is necessary for remedying war damage is entirely one for the Commission and if, as is submitted, the Commission had some evidence to show that they were not liable for the whole damage this appeal ought to be allowed.

E. E. S. Montagu K.C. and *Michael Hoare* for the owners. The facts on which the Commission decided this case are set out in cl. 3 (*h*) of the case and nowhere else. It is insufficient evidence. The injury to these houses was caused by the bomb which alone necessitated the rebuilding of the front walls. The Act was passed at a time when it was known that buildings were likely to be in a state of disrepair, because no repair could be done during the war and the pressing need was to reinstate the population in houses suffering war damage Those are facts to be borne in mind in looking at the Act. Many houses would never have been repaired or rebuilt without payment of cost under the Act and if the construction sought to be put on the Act by the Commission were adopted, the payment of costs could not be made for many years.

In s. 2, sub-s. 1, of the Act war damage is defined as

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(1) [1920] A. C. 956, 983.
(2) [1942] A. C. 691.
(3) (1946) 62 T. L. R. 753.
(4) [1945] K. B. 89.
(5) [1946] A. C. 543.

"damages occurring . . . . as the direct result of action taken "by the enemy." Section 6 contains the first reference to cost of works as being "the cost of works executed for making "good the damages." Further, Parliament has carefully set out in terms what can minimize the cost of works: see s. 8, sub-s. 4 and sch. III. Thus sch. III, para. 3 (1.) provides that "the amount of a payment of cost of works shall be reduced "by any amount by which the proper cost is increased by "reason of any physical change in the hereditament not "directly attributable to war damage (other than ordinary "wear and tear) occurring between the time of the occurrence "of the damage and the time when it is made good." This is important because no reference is made to the time before the occurrence of the war damage. Provision is made for subsequent neglect but not previous neglect. It is not inconsistent with the law that a person who has to put something right may have to make something better than before: compare *Wilson* v. *Chatterton* (1).

[Cohen L.J. Does this argument give full effect to the words "direct result?"] "Direct" there excludes secondary causes as in the *Greenfield* case (2). The Commission have admitted that there is nothing in the Act to entitle them to scale down their payment because the owner of a hereditament is getting new for old. Then can it make any difference that here the walls were not carried away by the blast but had to be removed to remedy the damage?

Michael Rowe K.C. replied.

Cur. adv. vult.

April 25. COHEN L.J. delivered the judgment of the court. This appeal raises a question as to the true construction of the War Damage Act, 1943. We were told that it is the first case under that Act and is intended to be in the nature of a test case, but for reasons which will appear later in our judgment, we think the decision of it turns on its own facts.

It will be convenient first to refer to the relevant provisions of the Act. Section 1, sub-s. 1, provides that there shall be made, subject to and in accordance with the provisions of Part I of the Act, payments by the Commission out of the moneys provided by Parliament in respect of war damage to land occurring during the risk period therein mentioned.

(1) [1946] K. B. 360. (2) [1945] K. B. 89.

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Section 2 defines war damage. So far as material to this case it is in the following terms: " In this Act the expression " 'war damage' means—(*a*) damage occurring (whether " accidentally or not) as the direct result of action taken by " the enemy or action taken in combating the enemy or in " repelling an imagined attack by the enemy." I turn to Part I of the Act. Section 5 defines the hereditaments that are to be units for payment in respect of damage to land and distinguishes in sub-s. 2 between (*a*) buildings (excluding certain classes of buildings) or parts thereof and the sites of such buildings or of part thereof and (*b*) other land. It defines a hereditament that comprises a building falling within para. (*a*) of the sub-section or a part of such a building as a " developed " hereditament." Section 6 defines the nature of payments to be made in respect of damage to land and distinguishes between a cost of works payment and a value payment. So far as material it is in the following terms: " Subject to the provisions " of this part of this Act, a payment to be made thereunder shall " be of one or other of the following kinds, that is to say— " (*a*) a payment of cost of works,being a payment of an amount, " determined by reference to the cost of works executed for " making good the damage, as provided by s. 8 of this Act " (*b*) a value payment, being a payment of an amount determined by reference to the depreciation in value of the " hereditament caused by the damage as provided by s. 10 " of this Act." Section 7 lays down rules for the determination of the question whether a payment to be made shall be a cost of works payment or a value payment. Sub-section 1 (*a*) provides that in the case of a developed hereditament (and the hereditaments with which we are dealing are developed hereditaments) the payment shall be a payment of cost of works unless the war damage involved total loss. Sub-section 2 lays down the rules for determining whether the war damage involves a total loss and is in the following terms: " War " damage to a developed hereditament shall be deemed to " involve total loss if, and only if, it is such that the proper cost " ascertained as at the thirty-first day of March, nineteen " hundred and thirty-nine, of such works as would be required " for reinstating the hereditament in the form in which it " existed immediately before the occurrence of the damage " would be likely to be more than the difference between the " amounts respectively, ascertained by reference to prices " current at that day, which the fee simple in the hereditament

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" might have been expected to realize—(*a*) on a sale thereof in " the state in which it would be after the execution of those " works, and (*b*) on a sale thereof as a site and with the damage " not made good, being in each case a sale such as is specified " in para. 1 of the Second Schedule to this Act made on that " day." Then follows a proviso which it is unnecessary to read. Section 8 lays down rules as to the calculation of the amount of the cost of works payment. Sub-sections 2, 3 and 4 are in the following terms: " (2.) If the war damage is " made good by reinstating the hereditament in the form in " which it existed immediately before the occurrence of the " damage, the amount of the payment shall be an amount equal " to the proper cost of the works executed for the making good " thereof: Provided that if the reinstatement of any part of " the hereditament could have been omitted without detracting " from the value of the hereditament, or the omission thereof " would have increased its value, the amount of the payment " shall be reduced to what it would have been if that part had " not been reinstated. In this part of this Act the expression " ' the permissible amount ' means, in relation to a payment of " cost of works, the amount that is payable by virtue of this " sub-section or that would have been payable if this sub-section " had had effect in relation to the payment. (3.) If the war " damage is made good by works which include alterations or " additions to the hereditament, the amount of the payment " shall be an amount equal to so much of the proper cost of the " works executed for the making good of the damage as falls " within the permissible amount. (4.) The preceding provisions " of this section shall have effect subject to the provisions of the " Third Schedule to this Act as to deductions in respect of the " value of materials, of failure to take steps to minimize war " damage, of physical changes not directly attributable to war " damage occurring between the occurrence and the making " good of war damage, and of the cost of works which contribute " to the making good of war damage occurring on two or more " occasions." It will be convenient here to refer to the third schedule. It is divided under three heads. The first head is not material. The second head deals with deductions from payments for failure to minimize the damage after the happening of the event. The third head deals with the deductions where damage other than war damage or repeated war damage is sustained. Paragraph 3 (1.) is in the following terms: " The amount of a " payment of cost of works shall be reduced by any amount

" by which the proper cost of the works executed for making " good the war damage is increased by reason of any physical " change in the hereditament not directly attributable to war " damage (other than ordinary wear and tear) occurring " between the time of the occurrence of the damage and the time " when it is made good."

It is to be observed that neither here nor in s. 8 is there any provision for a deduction in respect of damage already existing at the time of the occurrence of the event which caused the war damage. Section 10 lays down rules for the calculation of the amount of a value payment. Sub-section 1 is in the following terms: " Subject to the provisions of this part of this Act, " the amount of a value payment shall be an amount equal " to the amount of the depreciation in the value of the heredita- " ment caused by the war damage, that is to say, the amount " by which the value of the hereditament in the state in which " it was immediately after the occurrence of the damage is less " than its value in the state in which it was immediately before " the occurrence of the damage." It is to be noted that in this section an express reference is made to the state, as distinct from the form, in which the building was before and after the accident. The only other section to which we need refer is s. 32 under which the owners brought the matter before the court. Section 32 is to the effect that any question arising in carrying out the provisions of ss. 6 to 8 or s. 10 and certain other sections and provisions of the Act, shall be determined by the Commission with a right (under sub-s. 3) for any person aggrieved by any such determination—with certain exceptions —to appeal therefrom on any question of law to the High Court. The making of rules of court is authorized by the same section and this has been done by Rules of the Supreme Court Order 55C, which in its revised form bears date April 25, 1946, and is printed in the Weekly Notes of May 11, 1946. This case came before Vaisey J. as a nominated judge within the meaning of s. 4 of the Act.

I turn to the circumstances which led to this appeal. [His Lordship stated the facts down to the service of the notice of motion by the owners and continued :] That notice having been served, it became the duty of the Commission under Or. 55C. r. 2 (4.) to state a case, setting forth the facts on which their determination was based and to file the case in the action department of the Central Office. The Commission complied with this obligation on May 24, 1946. The relevant facts are found by the Commission in para. 3 (*h*) of the case, where they set forth and adopted a report by one of their technical officers dated May 27, 1943. So far as material that report is in the following terms: " Jamaica Street, E.1. In response to " Messrs. Rawlence & Squarey's letter of the 10th inst., I met " Mr. Yeo and inspected thirteen houses which have been " structurally damaged. A bomb fell on the opposite side of " the road demolishing several houses, and has seriously affected " the stability of the front walls of the houses inspected, in " varying degrees. These houses are old, and the front walls " are in a bad condition due mainly to the inherent nature of " the brickwork. However, these defects have been accentuated " by blast effect, and the front walls will have to be rebuilt, " as scheduled below. As the walls were defective prior to the " bombing, the proportion of the proper cost to be borne by " the Commission has been agreed by me as detailed in the " schedule." The schedule indicated that three-quarters of the fronts of Nos. 36 and 38 and the whole of the fronts of Nos. 40 and 42 required rebuilding. It also indicated that in the view of the writer, the proper percentage of the cost of such rebuilding to be borne by the Commission was 40 per cent., but gave no indication of how that percentage was calculated.

As we read this statement, it is saying that (1.) the bomb seriously affected the stability of the front walls of the houses, (2.) the houses were old and before the bomb fell, the front walls were in bad condition due mainly to the inherent nature of the brickwork, (3.) the defects thus existing in the front walls were accentuated by the blast of the bomb, (4.) as a result of the bomb the front walls will have to be rebuilt to the extent indicated in the schedule. We are unable to read into the technical officer's report a statement that the pre-existing defects occasioned the instability or were such as to render the walls unsound, nor can we find any statement to this effect in any other part of the case. This was clearly the view taken by Vaisey J., where he said (1): " In the present case, three- " quarters of two of the walls and the whole of the other two, " have had to be pulled down and rebuilt, and for myself I " cannot see how it could ever be known whether the same or a " less amount of work would have had to be done if the four " walls had, just previously to the time when the bomb exploded " been free from all structural defects. There is no finding

(1) Ante p. 167.

"to the effect that the walls would have fallen down within any "measurable distance of time if no enemy action had injured "them."

In the result Vaisey J. found that the Commission was responsible for 100 per cent. of the cost of the works in respect of the rebuilding of the walls since the rebuilding was the "direct result" of the explosion. With this conclusion we entirely agree. The Attorney-General suggested that this conclusion was not open to Vaisey J. nor to us, in view of the purported finding of fact in para. 5 of the case, where the Commission say: "The Commission were of opinion and "decided that, as a matter of fact, the whole of the works "executed to the four properties were not necessary to make "good war damage." He is, however, we think, in a dilemma since either, as Vaisey J. said, this purported finding of fact is not a pure finding of fact but involves a question of law, namely, the construction of the Act itself, or, if it is a finding of fact, there is no evidence to support it.

Vaisey J. did not, however, base his decision purely on the finding of fact; for he went on to say (1): "the explosion was "(in other words) the proximate or immediate cause of the "damage and not merely a contributory cause acting in con-"junction with the structural defects as another contributory "cause; and even if (which is by no means shown to "be the case) those defects constituted a causa sine qua non, "the enemy action was none the less the sole causa proxima, "which is to my mind only another way of saying that the "damage occurred as its direct result." The Attorney-General at one stage in his argument accepted the view that the "causa proxima" is the sole governing factor and suggested that the true analogy was to be found in certain marine insurance cases (see e.g., *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* (2)). Mr. Montagu, on the other hand, argued that a better analogy was to be found in Workmen's Compensation cases (see *Wilson* v. *Chatterton* (3)), and that accordingly claimants would be entitled to recover the full cost of the work unless enemy action was to no extent responsible for the works having to be carried out. We think it better not to decide this point until a case comes before us in which it arises for direct decision. We must, however, point out that neither argument leads to an equitable result, for the

(1) Ante p. 167, 168.
(2) [1942] A. C. 691.
(3) [1946] K. B. 360, 367.

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Attorney-General was compelled to admit that if this argument of his was well founded, the Commission should have rejected in toto the owner's claim, although their expert attributed one-third of the cost to enemy action, while Mr. Montagu admitted that if his argument was well founded, the owners would have been entitled to succeed had the walls been condemned as dangerous structures before the bomb fell. The Attorney-General realizing that his first argument carried him too far in view of the determination of the Commission, abandoned it so far as this case was concerned, and argued in the alternative that the cost of works should be apportioned. This argument is conveniently stated by Vaisey J. (1), where he says: "If the "unsoundness of the building was of such a character that the "war damage was greater than it would have been if the build-"ing had previously been perfectly sound, then the Commission "should not be called on to pay more towards the cost of "reinstatement than they would have had to pay to reinstate "the hypothetically sound building." Vaisey J. rejected this argument, saying (1): "My difficulty in accepting that is two-"fold: first, I cannot find that the Commission have ever "applied any such formula to the present case, and, secondly "that it would be impossible to apply it to any case without "some sort of inquiry which could rarely, if ever, be satis-"factorily answered, for it is well known that a well-built rigid "structure may suffer greater damage from 'blast' than an "old building possessing qualities of suppleness, resilience and "flexibility." The first reason given by Vaisey J. for rejecting this argument is, in our opinion, conclusive. The facts as found do not afford a basis on which the argument can stand. We desire, however, to keep open the point whether in some other case the facts may not justify an apportionment; for instance, to take one of the hypothetical cases propounded by the Attorney-General, suppose the only visible damage due to enemy action was broken windows, but when it was sought to replace the broken windows, it was found that owing to the defective condition of the frames and surrounding brickwork the glass could not be put back without fitting new frames and making good the defective brickwork. If the defects in the frames and brickwork were not due to any extent to the enemy action, there would be strong ground for the argument that the claimant could not recover the cost of repairing the brickwork or fitting new frames.

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(1) Ante p. 167.

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For these reasons, we are of opinion that the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Treasury Solicitor; M. T. Turner & Co.*

H. C. G.

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April 1.
Lord Greene M.R., Morton and Asquith L.JJ.

In re VICKERS' LEASE.

POCOCK *v.* VICKERS.

Landlord and tenant—Demise of fishing rights—Provision for owner retaining one rod for her own use—Construction—Whether a profit à prendre or a personal right for her own life.

In a lease for a term of twenty-one years of the exclusive right, privilege and liberty of fishing over part of the River Test and taking away any fish caught, cl. 3 provided: "It is hereby understood "and agreed that the owner shall retain for her own use a rod in "the said fishing . . . ." The owner having died during the term of the lease:—

Held, that cl. 3 conferred a contractual right only to fish and take fish caught on the owner which was personal to herself and ended on her death.

APPEAL from Roxburgh J.

By a lease dated December 15, 1933, Bertha Vickers (hereafter called the owner) granted and demised to Percy Coventry Tarbutt (hereafter called the tenant) the exclusive right, privilege and liberty of fishing in the River Test as shown in the plan annexed thereto in the parish of Romsey in the county of Southampton and the right to have and carry away the fish when caught, and also the dwelling-house known as the Island with the garden and cottages for the term of 21 years from December 25, 1933, at the yearly rent of 400*l.* being 150*l.* for the house and cottages and 250*l.* for the fishing. Clause 3 of the lease was as follows: "It is hereby understood "and agreed that the owner shall retain for her own use a "rod in the said fishing but not on either bank between the "mill and Greatbridge." By cl. 4 the tenant covenanted with the owner to observe and perform the provisions and stipulations in the first schedule. These provisions and stipulations included: (para. 3) to protect and preserve the fish in the river including spawn and young fish and to keep the river stocked with sufficient fry, yearlings and other size fish ; (para. 4) to exercise the rights and privileges so as to do as little injury as possible to the banks of the river and the tenants and others holding lands on the adjoining bank and to pay compensation for all injury ; (para. 5) " To " exercise the said rights and privileges properly and in a " sportsmanlike way and by fair rod and line angling " ; (para. 6) not without the owner's written consent to capture or attempt or permit the capture of fish by netting (except for the destruction of grayling, pike and other coarse fish) nor permit worming or minnowing except in high flood except for the taking of coarse fish ; and (para. 7) to keep constantly employed at the tenant's cost a keeper or watcher to supervise the tenant's part of the river and protect the fish and fishing rights.

The tenant died on May 24, 1943, and the owner died on February 19, 1946. Doubts having arisen as to the true meaning of cl. 3 of the lease, the plaintiffs who were the tenant's executors took out an originating summons on August 16, 1946, to have it ascertained whether the right to retain a rod in cl. 3 was limited to the owner personally for her life or had any wider import.

ROXBURGH J. held that the right reserved to the owner, could not be limited to the owner personally during her life but reserved to her beneficial interest in a rod during the term of the lease. The tenant's executors appealed.

A. C. Nesbitt for the tenant's executors. It was provided in cl. 3 that the owner should retain for her own use a rod and the words " for her own use " show that the right to a rod is personal to herself and ended therefore on her death. It is an unreasonable view that the right is to be saleable and transferable. The covenants in the schedule relating to fishing show how strictly the fishing right is to be used and while the owner could be trusted to comply with these provisions without any words expressly binding her, there is nothing to show that if the right passed to her executors and then sold that the same use of the rod in a sportsmanlike way would continue. This confirms the view that the right is the personal one that the words " for her own use " indicate.

Andrew Clark K.C. and *G. C. Dunbar* for the owner's executrix. Clause 3 of the lease operated as the grant of a profit à prendre. It therefore confers an interest in land and it

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therefore passes on death and is assignable: *Fitzgerald* v. *Firbank* (1). A profit of fishing is normally described as a right to fish and take away the fish caught. The words "for "her own use" in cl. 3 make it clear that the right is not merely to fish but to take away fish caught. A mere licence of pleasure without a right to take away is personal. But when there is a right to take away the right is exercisable by servants or anyone authorized to fish. If it be intended that the right of fishing is not to be exercised by a servant of the owner of a profit à prendre, the right of fishing must be restricted by covenant.

[Lord Greene M.R. Do you say that it is impossible to grant a personal right to fish and take away fish?] Yes, because the grant creates an interest in land. It could only be restricted to a licence by a very careful expression of the intention to limit it in this way. On a grant of a profit à prendre a purported restriction on alienation is void. If the words "for her own use" were to be treated as a restriction they would be inconsistent. The provision in cl. 3 of the lease operates as a re-grant and the words "for her own use" are merely words of limitation. If the right of fishing be regarded as a bundle of rods, one of these is reserved to the owner and the tenant has only the rest of the bundle. The clause is a re-grant not a reservation: *Wickham* v. *Hawker* (2) and under the re-grant the right is assignable: Co. Litt., vol. 2, p. 223a. The right could only be a personal one if it were coupled with a power of re-entry: *Metropolitan Water Board* v. *Solomon* (3) and Williams and Eastwood on Real Property, p. 193. The owner has nowhere provided that the word includes her heirs and assigns but it is clearly so used constantly in the lease and it cannot be given a different meaning in cl. 3.

A. C. Nesbitt in reply. There were in *Wickham* v. *Hawker* (2) no contractual words such as there are in cl. 3 of the lease. That clause is not a re-grant, or an exception or reservation, such as was in that case construed as a re-grant. Here the words are pure words of contract as shown by the words "it is hereby "understood and agreed" and there is nothing to prevent cl. 3 being construed as an agreement that the owner should have a personal right during her life.

LORD GREENE M.R. [after stating the facts:] Clause 3 of the lease that gives rise to the difficulty is not expressed to

(1) [1897] 2 Ch. 96.

(2) (1840) 7 M. & W. 63, 76.

(3) [1908] 2 Ch. 214, 219.

be an exception or a reservation, nor are the words the sort of words one would expect to find if what was intended was a re-grant; and I use those three words, "exception," "reservation" and "re-grant," in a technical sense. The clause has all the appearance of something put in quite independently of anything else in the lease, and its language is more appropriate to a contractual term than to the grant or the creation of some estate. The clause is as follows: "It is hereby understood and agreed that the owner shall retain for her own use "a rod in the said fishing but not on either bank between the "Mill and Greatbridge." The arguments, when tracked to their foundations, all turn on the words "for her own use." Mr. Andrew Clark, for the executrix of the owner who is dead, says that this clause cannot be an exception or a reservation because there cannot be an exception or a reservation of a profit à prendre—excepted and reserved, that is, out of a grant: you can only have a profit à prendre in such circumstances created by re-grant. This, he says, is the re-grant of a profit à prendre, and he interprets the words "for her own use" as merely stating or emphasizing the fact that she, the owner, is to have the right of a rod as absolute and beneficial owner—during, of course, a limited period; and that period Mr. Andrew Clark says is the duration of the lease, because that was the limit to what the tenant could give and he must be taken to have re-granted everything that was possible having regard to the length of his own estate. Mr. Andrew Clark says that the words "for her own use" cannot be construed as imposing some limitation on alienation or enjoyment, because to do so would be repugnant to the whole conception and nature of a profit à prendre. It follows, according to his argument, that this is a re-grant of a profit à prendre for the beneficial use of the owner herself and as such is capable not merely of personal enjoyment but of alienation by her or by her successors in title after her death. Mr. Andrew Clark does not, as I understand his argument, contest the proposition that by apt words, or words that on their true construction have that meaing, it is competent to give to a person the personal right to fish and to take away the fish caught, a right that would be limited to some definite period, of course. If it purported to be an out-and-out grant, different considerations might apply; but when a limited period is being dealt with, be it a day or a year or twenty years or a lifetime, I understand him to admit that there is nothing in law to prevent the gift to a person of the personal

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right, exercisable by nobody else, to fish and take away the fish. He would say that very clear words are required to produce that result, and I think he would also say that if the construction of the words led to such a result the right could be not a profit à prendre, but a personal licence and nothing else, notwithstanding the fact that the right included the right to take away the fish. I hope I have not misunderstood Mr. Andrew Clark or attributed to him some concession greater than he intended to make, but speaking for myself I should require very strong authority to convince me that if parties were minded to create such a right the law in some way prevented them from doing so. In the present case the language, he says, that is used is not sufficiently clear to produce such a result.

Mr. Nesbitt, on the other hand, for the executors of the tenant (who is also dead) maintains that this is a purely contractual matter, that there is no question of exception or reservation; nor, he says, are the words what you would expect to find in the case of a re-grant, although he admits that in a suitable context the word "retain" might operate to effect a re-grant. Here, however, he says, looking at this clause in the position where it is to be found in the lease, you would not naturally read it as showing an intention to re-grant, and he particularly relies on the words "for her own use." On Mr. Andrew Clark's construction it appears to me that those words are really surplusage. Precisely the same effect would be achieved, according to his argument, if they had been left out, because the word "Owner" must be construed as including heirs and assigns and there is nothing to suggest anything but a beneficial right; therefore the words "for her own use" would be mere surplusage. Why are they put in? I think some light can be found on that when one realizes the nature of this particular subject-matter. First of all, the right is expressed as "a rod": it is therefore in a sense metaphorical, in another sense not metaphorical; but what the word appears to contemplate is the right to use some physical object, namely, a rod—which implies, it is said, the right to fish by rod and line. That word, I think, must not be ignored; and what she has got is a rod, which she is to use for her own use. The right of fishing is one which you would expect to find in some way limited or qualified by prescribing the particular conduct that a sportmanslike person would be expected to observe on a river such as the Test. Indeed, the tenant himself was put under very stringent covenants which are the perfectly proper and natural covenants to which I have referred. It is said by Mr. Andrew Clark that if his construction is accepted precisely the same covenants would, by implication, extend to the owner as the proprietor of the rod, but I am not at all sure that that is so. They are not expressed as conditions; they are expressed purely in covenant and nothing else, and if the owner had intended to be subject to the same obligations in respect of fishing on the river I should have expected them to have been set out expressly. But however that may be, I cannot avoid inferring, from the whole tenor of this document and the covenants, that fishing on this particular river is a thing in which you want to know your fisherman, and it would be quite natural that the person granting a rod or giving a right to maintain a rod on the Test would expect to exercise some choice in the person to whom he granted it. I think the fact that it is necessary to impose these restrictions rather confirms that view. If Mr. Andrew Clark is right, the owner could the next day have assigned this right to anybody she chose, and her executrix to-day could assign it to anybody that she chose, and do so for value or not for value. That is a right which I should not have expected to find, unless the language compelled me, in a document of this kind; and when I find that the right in question is put in in a three-lined clause by itself, expressed in language which is much more apt to express a contractual obligation than the creation of a right such as a profit à prendre, I am confirmed in the view that that is the proper construction.

Roxburgh J. thought that the case was a difficult one, but he took the view that what the draftsman was contemplating was a bundle of rods and he visualized the owner as granting the rods but retaining one rod for her own use. He thought that the phrase " for her own use " did not involve any conception except that the rod was to belong beneficially to the owner. He said it was a narrow point and a difficult point. Mr. Nesbitt's construction is not necessarily limited to the personal use of the rod by the owner. He concedes that it is possible that she personally might have lawfully allowed somebody else to use it during her life, but if she had any such licensing power he says it would be personal to her. I do not find it necessary to express any concluded opinion upon that, but my own strong impression is that this alternative is not the correct view. I should have thought that this is a case where the right to use the rod as I have suggested, the rod being regarded as in a sense a physical object, is intended to be one for her own exclusive personal use, which must die with her and in her lifetime was not alienable. The case, I agree, is not an easy one, but that is the conclusion to which I have come, and in the result the appeal succeeds.

MORTON L.J. I agree, and I have very little to add. It is a small point, but perhaps worth mentioning, that at the opening of this lease we find that it is " made between Bertha Vickers " (then the address is given) " (hereinafter called ' the Owner ') " of the one part and Percy Coventry Tarbutt . . . . (hereinafter called ' the Tenant ') of the other part." There is not in that opening clause what one finds so often—an extension of the words " the Owner " to include the successors in title of the person named. I do not doubt that in parts of this lease, by reason of the context, the expression " the Owner " would extend to the successors in title of Miss Vickers, but in my view it refers only to Miss Vickers in cl. 3. The next point to be noted is that the fishing rights which are conferred by the lease are obviously of considerable value, so much so that the rent is 150*l.* for the house, out-house and cottages and for the fishing 250*l.* Then, as my Lord has pointed out, there are very elaborate terms laid down as to how the tenant is to exercise his right of fishing.

It is suggested that this brief cl. 3, which has already been read, was intended to confer upon Miss Vickers and her successors in title not only the right to fish, and to take away the fish, but also the power to assign that right for value to any person or, if they so wish, to license a different person to come and fish each day for a monetary payment. That would obviously be a very valuable right to be reserved or re-granted to the owner, and it would at the same time be a right which would be quite onerous to the fishing tenant. For my part, I cannot imagine that, if it were intended to confer such a right as that upon Miss Vickers and her successors in title, it would have been done by the use of the words which appear in cl. 3. I think that a very different form of words would have been employed, and a very full and careful form of words. I think that by the words " It is hereby understood and agreed " that the Owner shall retain for her own use a rod in the said " fishing," it was intended to do nothing more than to enable Miss Bertha Vickers to come and fish herself. It may possibly

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be that Miss Vickers would have had the right personally to allow, for example, her nephew to come and fish. As to that I feel some doubt, but it is not necessary to express a view upon it. However that may be, in my judgment this is not a right which was ever intended to endure beyond the life of Miss Vickers, and I agree that this appeal should be allowed.

ASQUITH L.J. I also agree, and have nothing to add.

Appeal allowed.

Solicitors: *Holmes, Son & Pott; Montagu's & Cox & Cardale, for Branson & Son, Sheffield.*

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NEWCASTLE-UNDER-LYME CORPORATION *v.* WOLSTANTON, LIMITED.

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Dec. 5, 6, 9, 10, 11, 12.

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Jan. 21.

Morton, Somervell and Cohen L.JJ.

Mines—Local authority's gas undertaking—Right to support for pipes—Occupation confined to space occupied by pipes—Gas Works Clauses Act, 1847 (10 & 11 *Vict., c.* 15), *s.* 6*—Waterworks Clauses Act,* 1847 (10 & 11 *Vict., c.* 17), *ss.* 18–27*—Public Health Act,* 1875 (*Support of Sewers*) *Amendment Act,* 1883 (46 & 47 *Vict., c.* 37), *ss.* 4, 5.

The Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, applied the "mining code" of the Waterworks Clauses Act, 1847, to local authorities carrying on gas undertakings, the question of payment of compensation for damage by mine working to, inter alia, gas pipes laid in the ground accordingly being postponed until the working came within forty yards of the pipes. Section 4 of the Act, in view of the above provision for compensation, provided that a local authority should not, by reason only of anything contained in the Sanitary Act under the authority of which, among other works, gas pipes had been laid, be deemed to be entitled to any right of support for those pipes.

The gas pipes laid in the ground by a local authority under statutory powers for the purposes of their gas undertaking were damaged between 1934 and 1942 by the workings of a coal mine, with resulting loss to the authority. The surface of the land in which the pipes were laid had been severed from the subjacent minerals before any pipes had been laid, and enjoyed at all material times an unqualified right of support from those working the minerals. The local authority's claim against the mineowners for

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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damages was for the period down to 1942, the matter thereafter being regulated by orders of the Railway and Canal Commission. The local authority were not entitled to claim compensation as provided for by the Act of 1883 because they had not surveyed or mapped their gas works as required by the Act. Evershed J., held that the statute under which the local authority had laid the pipes gave them the exclusive right to occupy for the purposes of their gas undertaking the space in the soil occupied by the pipes and that subterranean part of the soil on which the pipes rested; that that exclusive occupation did not involve the vesting in the local authority of any legal or equitable estate in the land; but that the authority were nevertheless entitled, by virtue of that occupation, to maintain a common-law action of nuisance against the mineowners for their unlawful interference with the natural right to support of the land. On appeal by the mineowners:—

Held (1.) that the local authority's exclusive right of occupation was limited to the space in the soil taken up by their pipes, and so did not apply to any part of the soil on which the pipes rested; that, therefore, the only right to support for their pipes ever enjoyed by the authority was the implied right of support for the pipes themselves, as distinct from the right of support enjoyed by the owners of the soil, arising, on the principle in *Normanton Gas Co.* v. *Pope and Pearson, Ld.* (1883), 52 L. J. (Q. B.) 629 and *In re Dudley Corporation* (1881) 8 Q. B. D. 86, out of the exercise of their statutory power to lay the pipes, which right was taken away by s. 4 of the Act of 1883; and that the authority's claim for damage caused by mine workings within the forty-yard limit prescribed by the Act therefore failed; (2.) that s. 4 of the Act of 1883 operated similarly to take away the authority's right to damages for mine workings outside the forty-yard limit as, on its true construction, the section contained nothing to confine its operation to damage caused by workings within that limit.

Quaere, whether, even if the local authority had enjoyed the right of support of the soil beneath their pipes, that right would have accrued to them otherwise than through the statute authorizing the laying of the pipes and so have remained unaffected by s. 4 of the Act of 1883.

Decision of Evershed J. ante p. 92, reversed in part.

APPEAL from Evershed J. (1).

The following statement of the facts is substantially that of Evershed J. as set out in the judgment of Morton L.J.:—By their writ in the action the plaintiffs, Newcastle-under-Lyme Corporation, claimed against the defendant company, Wolstanton, Ld., a declaration that the company was not and is not entitled to mine or otherwise to work any coal, ironstone or other minerals under or near to the corporation's gas mains laid within the township of Wolstanton or elsewhere in the borough of Newcastle-under-Lyme, in such manner as to let down, destroy or injure any of those gas mains; an appropriate injunction; and damages. In the circumstances the claim resolved itself into one for damages only.

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(1) Ante p. 92.

The corporation sued as the gas undertakers in respect of a considerable area of the township of Wolstanton, the damages claimed being in respect of the gas pipes laid under the streets and pavements in that area. The corporation became the gas undertakers for the area by virtue of the Newcastle-under-Lyme Extension Order, 1941, made in pursuance of s. 46 of the Local Government Act, 1929, which had the effect of abolishing the Wolstanton United Urban District Council and vesting in the corporation all the property of that council and all their powers, duties and liabilities as gas undertakers: see ss. 28 and 30.

Wolstanton United Urban District Council themselves became the undertakers for the relevant area by virtue of the Wolstanton United Urban District Council Gas Act, 1906. Briefly, the effect of that Act, which incorporated, subject to immaterial exceptions, the Gas Works Clauses Acts, 1847 and 1871, was that the council became the compulsory purchasers of the gas works, mains, pipes and other the gas undertakings, so far as related to that area, of Newcastle-under-Lyme and Burslem Corporations (see ss. 9 and 10) with power to continue and maintain in the area the gas works and gas undertakings of the two corporations mentioned. By other provisions of the Act the council acquired the undertaking of another body known as the Chesterton Gas Light Co., Ltd., which had certain gas generating plant in the village of Chesterton and also supplied gas in that village. Those provisions had no bearing on the present case. The two local authorities whose gas undertakings within the Wolstanton district were acquired by the last mentioned Act had in turn derived their power from two Acts passed in 1877, namely, the Newcastle-under-Lyme Corporation Act and the Burslem Local Board Gas Act. These two Acts are, as would be expected from their respective titles, somewhat dissimilar in form, but nothing turned on the dissimilarity. In each case the local authority acquired the gas undertaking previously carried on by the local gas company known in the one case as the Newcastle-under-Lyme Gas Light Co. and in the other as the Burslem and Tunstall Gas Co.; in each case, with immaterial exceptions, the Gas Works Clauses Acts, 1847 and 1871, applied; in each case certain powers to acquire easements by agreement were conferred;

in each case the township of Wolstanton was included in the area covered.

In order to complete the history, it is sufficient to refer to the Newcastle-under-Lyme Gas Light Act, 1855, and the Burslem and Tunstall Gas Co.'s Act, 1857, as amended by a further Act in 1868, which Acts incorporated and regulated the gas companies respectively taken over by the Acts of 1877 above mentioned. The township of Wolstanton was within the limits of both companies; the Gas Works Clauses Act, 1847, applied to both; both were empowered to maintain, repair, etc., the then existing works, and were placed under an obligation, if required by the relevant local board so to do, to light streets as therin respectively mentioned.

Section 6 of the Gas Works Clauses Act, 1847 is headed "Power to break up streets, etc., under superintendence, and "to open drains," and provides: "The undertakers, under such "superintendence as is hereinafter specified, may open and "break up the soil and pavement of the several streets and "bridges within the limits of the Special Act, and may open "and break up any sewers, drains, or tunnels within or under "such streets and bridges, and lay down and place within the "same limits pipes, conduits, service pipes, and other works, "and from time to time repair, alter, or remove the same, and "also make any sewers that may be necessary for carrying off "the washings and waste liquids which may arise in the making "of the gas, and for the purposes aforesaid may remove and "use all earth and materials in and under such streets and "bridges, and they may in such streets erect any pillars, lamps, "and other works, and do all other Acts which the undertakers "shall from time to time deem necessary for supplying gas to "the inhabitants of the district included within the said limits, "doing as little damage as may be in the execution of the "powers hereby or by the special Act granted, and making "compensation for any damage which may be done in the "execution of such powers." Section 7 which is headed "Not to enter on private land without consent," provides: "that nothing herein shall authorize or empower the undertakers to lay down or place any pipe or other works into, "through, or against any building, or in any land, not dedicated to public use, without the consent of the owners and "occupiers thereof; except that the undertakers may at any "time enter upon and lay or place any new pipe in the place of "an existing pipe in any land wherein any pipe hath been "already lawfully laid down or placed in pursuance of this or "the special Act or any other Act of Parliament, and may "repair or alter any pipe so laid down."

All the pipes with which this action is concerned were laid under public highways, including footpaths. Until recent years the gas supplied in Wolstanton was derived from Burslem or, to some extent, from Chesterton, and not from Newcastle-under-Lyme. All the relevant pipes were laid in exercise of the general power contained in s. 6 of the Gas Works Clauses Act, 1847, or in pursuance of corresponding clauses in one or other of the private Acts cited, there being no evidence of any exercise of any powers to acquire easements or other proprietary interests by agreement.

The defendant company was incorporated in 1928 and acquired the residue of a lease of certain seams of ironstone and coal granted in 1917 to the company's predecessors by the Crown in the right of the Duchy of Lancaster. Two only of those seams were material to the case, namely, the Red Shagg ironstone seam at a depth of about 490 yards at the shaft and the Great Row coal seam at a depth of about 170 yards below that of the Red Shagg ironstone. Shortly after its incorporation the company began to work the two seams, and it has continued since to do so. No trouble arose between the corporation and the company until 1934, but from that year up to the date of the issue of the writ substantial damage was admittedly done to the corporation's gas pipes as a result of the movement of the surface land attributable to the company's mining operations.

The severance of the surface of the area in question from the subjacent mines was effected very many years ago, long before any of the gas works or pipes now in question were made or laid. Both surface and minerals appeared originally to have been part of the copyhold land of the Manor of Newcastle-under-Lyme. After this severance, the Crown, in the right of the Duchy, claimed that they and those entitled through them to work the mines enjoyed the benefit of a customary right to extract the minerals so as to let down the surface without any obligation to pay compensation for surface damage. That assertion was successfully challenged by a surface proprietor in 1844 before the Court of Queen's Bench in *Hilton* v. *Earl Granville* (1), but the Duchy and those interested in the minerals through the Duchy appear to have been undeterred

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(1) (1845) 5 Q. B. 701.

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by that reverse, and continued to assert the right to let down the surface land without payment of compensation until the corporation, acting as owners of a fire station, again challenged the validity of the alleged custom. On that occasion the litigation proceeded to the House of Lords: *Wolstanton, Ld.* v. *Newcastle-under-Lyme Corporation* (1). The House affirmed the view of the Court of Queen's Bench that the alleged custom was unreasonable, and finally negatived its existence. That decision having established that the mineral owners and those claiming through them had no right so to work the minerals as to let down or injure the surface land and accordingly that the owners of the surface in which the pipes here in question were laid have and always have had an unqualified right to the support of the land in its natural state, the company, in order to carry on its undertaking, applied to the Railway and Canal Commission. That tribunal made orders on December 17, 1943, empowering the company to work the minerals on terms of payment of compensation for damage caused. Under those orders the company is now admittedly entitled to work the mines so as to let down the surface, but upon terms, so far as concerns the corporation as gas undertakers, of being liable to pay compensation to them for any damage done to their gas works and pipes. By reason of those orders the corporation no longer ask for the declaration or the injunction mentioned in the writ, but have confined themselves to a claim for damages. The writ was issued on May 11, 1942, and, since the corporation concede that the company can invoke the Limitation Act, 1939, to limit its liability, the claim of the corporation is now confined to the damage proved to have been occasioned by the company during the period of six years immediately before May 11, 1942.

Particulars of the damage alleged fell under three heads: (1.) damage, equivalent to the cost of repairing a large number of breaks in the gas pipes or mains; (2.) damage, equivalent to the cost of replacing cast iron pipes with spun steel pipes where the breaks were such as to render it economically not possible to repair the pipes, or where the risk of further damage was so great as to make it impracticable to maintain iron pipes; (3.) damage for gas lost. It was not necessary for the court to consider the quantum of the damage suffered, as it was agreed at the trial that the company, by their workings, caused damage amounting to 4,500*l.* to the corporation's apparatus during the relevant period.

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(1) [1940] A. C. 860.

Evershed J. found as a fact that the damage suffered could not be limited or qualified by reference to such mining operations as took place within forty yards of the places where the damage occurred. He also found that the company had not failed to work "in a reasonable and proper manner" within the meaning of s. 4 of the Act of 1883, and that some of the damaged pipes were laid before August 25, 1883, that being the date of the passing of the Act of 1883. It was not suggested by the company that the movement of the surface land, which caused the damage suffered by the corporation, was in any way caused or aggravated by the presence of the corporation's pipes or mains therein.

Evershed J., decided in favour of the corporation and awarded 4,500*l.* damages. He decided in favour of the company on two subordinate issues.

On the company's appeal from that judgment the corporation served a notice, dated October 10, 1946, in the following terms: "Take notice that upon the hearing of the defendants' appeal "from the judgment made in this action and dated July 25, "1946, the plaintiffs intend to contend that if the appeal "succeeds, in any case the plaintiffs are entitled to damages in "respect of damage (*a*) to any gas mains laid prior to the passing of the Public Health Act, 1875 (Support of Sewers) "Amendment Act, 1883, and also (*b*) to any gas mains so far "as the damage was due to workings of minerals beyond a "distance of forty yards and that all necessary or proper "inquiries may be ordered and directions given with a view "to the ascertainment of such damages in default of the same "being agreed." That notice of cross-appeal raised before the court the two subordinate issues above mentioned.

Sir Cyril Radcliffe K.C., *Clark K.C.* and *J. B. Herbert* for the company. If undertakers, like the corporation here, acquire land for the purposes of their undertaking, there is nothing in any Act which prevents them, as owners of that land, from obtaining, as against mineowners, whatever rights at common law attach to the ownership of the land. Where, however, the undertakers have exercised their statutory rights under ss. 6 and 7 of the Gas Works Clauses Act, or ss. 28 and 29 of the Water Works Clauses Act, having carried out digging operations and hollowed out a chamber in the ground for the reception of their pipes, they had, until the passing of the Act of 1883, an implied statutory right, under their special Act, to have the pipes or other works supported by the mineowners beneath, or by any other landowner. Section 4 of the Act of 1883 had the effect of withdrawing that statutory right of support and putting in its place the form of protection known as the mining code contained in the Water Works Clauses Act. There is no such thing as a common-law right of support for a structure thus placed in the land. An undertaker's whole position, when he has laid pipes under statutory powers, or in private land by consent, rests on his special Act. It is not, of course, in dispute that there attaches to the ownership of the surface of land a natural right to have the surface supported by the owners of adjacent or subjacent strata. If the land is let down, the owner will obtain damages also in respect of buildings and other structures on the land which have not in themselves any right of support. It is submitted that Evershed J., made an unwarranted transition from that accepted doctrine in holding that, in a case where, as here, there is no question of letting down the surface of the land, there is a right of support for pipes running through the land. These have no natural right of support whatever. Here there has simply been a withdrawal of support of a structure. The corporation are the occupiers of nothing in the soil except the pipe which they have the statutory right to place in the chamber which they have hollowed out. [Morton L.J. The transition does not seem so startling from support for a building to support for a structure placed in the land under statutory powers.] The building per se is not entitled to support, only the land. The building is merely concerned on the question of damages, unless it has acquired right of support by prescription. Here there is nothing but a statutory right in the corporation to make a cavity in the land and place their pipe in it.

A wider objection to the right of support to which the judge has held the corporation entitled, as occupiers, for their pipes, is that the right is in any event a statutory one which s. 4 of the Act of 1883 has done away with. The occupation on which the judge founds the right of support is the creature of the corporation's Sanitary Act. The corporation claim to sue the mineowners for nuisance because they (the corporation) are occupiers of the land. Challenged as to what kind of an occupier they are, they can only reply that they have a right to occupy because the statute says so. If an undertaker actually buys for his works land which already has a right of support, the imposition of the mining code will, of course, not result in the

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disappearance, in the hands of the undertaker, of a right which will always exist in the land whoever owns it. Where, however, the undertaker has not bought the land, but has merely exercised the statutory power of putting his pipes in it, the area has not been reduced which the mineowner has to take into account as entitled to support, but a very special kind of interest has been introduced into the soil the consequences of letting down or injuring which may be very serious. The only part of the surface withdrawn from the mineowner's possible liability for letting down is the area covered by the undertaker's pipes, but that will not lessen the general liability which may arise if the surface is let down, agricultural damage, damage to buildings, etc. The pipes are brought in by the judge as extra damage-liability exactly as with a house built on the land. [Lord Selborne's speech in *Dalton* v. *Angus* (1) read.] Lord Selborne distinguished clearly between the natural rights in respect of land in its undisturbed state and the rights which have to be acquired by some act inter partes, such as grant or prescription, where land not in its undisturbed state is concerned, that is, where there is a right of support for a structure. [Dissenting speech of Viscount Maugham in *London & North Eastern Ry. Co.* v. *B. A. Collieries, Ld.* (2) and *Stroyan* v. *Knowles* (3) referred to.] [Morton L.J. If, in the present case, the owners of the soil had put in the pipes in question, which admittedly did not add to the burden of support, they could have recovered damages for injury to the pipes ?] Yes.

The most important case on the question of the implied statutory grant of the right of support which, it is submitted, is the true right of the undertakers in cases of this kind is *In re Dudley Corporation* (4). The right upheld there was a statutory grant of support for the sewer itself, not one based on the occupation of strata. Cotton L.J.'s judgment admittedly offers some support for Evershed J.'s view, but the other two judges do not deal with the matter in the same way, and the Act of 1883 was not yet in existence. In *Normanton Gas Co.* v. *Pope & Pearson, Ld.* (5), the gas company had placed their pipes in a highway which could not be let down, yet the case was not decided on that ground, either at nisi prius or in the Court of Appeal. The plaintiffs' rights were regarded as

(1) (1881) 6 App. Cas. 740, 790.

(2) [1945] A. C. 143, 158.

(3) (1861) 6 H. & N. 454.

(4) (1881) 8 Q. B. D. 86.

(5) (1883) 52 L. J. (Q. B.) 629.

turning on the right of support to be implied from the statutory grant of the right to lay the pipes. [The judgments in both courts read in extenso.]

If no title to land results from the exercise of the statutory right to lay pipes in it, then the right which the owners of the surface, and those claiming through them, have to support does not pass to the person exercising that statutory right. The two cases last mentioned show that the undertaker's right of support for his works has always been derived, not from his relationship to land, but from implied statutory grant. It cannot have been by inadvertence that the judges in *Normanton Gas Co.* v. *Pope & Pearson, Ld.* (1) left out of consideration the rights attaching to the soil of the highway. [The judgments in *London & North Western Ry. Co.* v. *Evans* (2) read in extenso, and *Clippens Oil Co., Ld.* v. *Edinburgh and District Water Trustees* (3) referred to.] All the above authorities show that a right of the kind in question here to execute works without taking the land has been regarded as carrying with it a statutory right to support. If by executing works on land, and so displacing the stratum or a portion of it, the undertaker were acquiring land in any real sense, he would have to go through the procedure of the Lands Clauses Acts and pay compensation. Neither here nor in any of those cases was that done.

The legislature intended by s.4 of the Act of 1833 to take away from undertakers the right of support for their gas pipes which until then had been held, on the *Normanton* (1) and *Dudley Corporation* (4) principle, to arise as a matter of construction of special Acts of the kind. That was their only right of support, since they had not acquired the land itself with its rights of support. [Morton L.J. Why does s. 4 say " by reason *only* ? "] One reason would be that a local authority might have acquired land or an easement under their Sanitary Act, by purchase or agreement. It is true that in such a case the statute has been the origin of the undertakers' acquisition of the land, with whatever rights may attach to it, but they have stepped into another category, as landowners, which they can fall back on for their right to support.

Apart from the submission that the right never existed which the judge has found as distinct from the implied statutory right to support for the pipes, even such other right as he has found derives, in truth, also from the Sanitary Act. Also it seems hardly realistic to speak of a stratum of land as having a right to support when it is really nothing but a cavity except that something has been put inside it which is not part of the land. [*New Moss Colliery Co., Ld.* v. *Manchester Corporation* (1) referred to, and speeches read in extenso as throwing light on the general meaning of the waterworks owners' mining code.] That case is distinguishable from the present in that the undertaker there had actually acquired the surface. *Charing Cross Electricity Supply Co.* v. *London Hydraulic Power Co.* (2) supports Evershed J.'s view that nothing properly to be described as property in the land was vested in the corporation by the exercise of their power to lay pipes below the surface. [*Nicholls* v. *Ely Beet Sugar Factory* (3) and *Paine & Co.* v. *St. Neots Gas & Coke Co.* (4) referred to.] [Somervell L.J. An action of nuisance lies in a variety of different circumstances, but has it been laid down that the right of support is possessed or exercisable only by those who have property in the land ?] It is a right which exists in respect of a defined piece of land, but there does not appear to be any decision that an exclusive licensee, a person occupying land under an exclusive licence, is debarred at common law from suing for nuisance. [Somervell L.J. Do you say that the right of support cannot in law be possessed by an exclusive licensee of a part of the surface ?] No natural right of support accrued to the chamber made in the ground for these pipes. The chamber is not part of the land at all, and so it is not something to which a natural right of support can attach. The very act of the statutory undertaker in creating the chamber, in making something other than an indistinguishable mass of land by the process of hollowing out, destroys the natural right of support, which can exist only in respect of the land in its natural state. That is the actual explanation of the creation of the right of support for works by statute. The very act which created the cavity destroyed the natural state of the land. It is impossible to claim a right of support for a cavity with a chattel in it. The damages claimed here are in respect of damage to the pipes only ; the claim is not that the land has been let down. This is all matter of common sense, and none of the authorities bears on it. In none of them did the conception occur to any of the judges which has commended itself to Evershed J. They have all regarded the right as a statutory one of support, and it is Evershed J., alone who has entered the imaginary world in which the cavity in the ground is being supported. [Judgment of Luxmoore L.J. in *Paine & Co., Ld.* v. *St. Neot's Gas & Coke Co.* (1) read in extenso.]

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(1) 52 L. J. (Q. B.) 629.

(2) [1893] 1 Ch. 16.

(3) [1904] A. C. 64.

(4) 8 Q. B. D. 86.

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(1) [1908] A. C. 117.
(2) [1913] 3 K. B. 442.
(3) [1931] 2 Ch. 84.
(4) (1939) 161 L. T. 186 ; 55 T. L. R. 1062.

If Evershed J. is right in the reasoning on which he has held against the mineowners here, he is right on grounds which, so far as is ascertainable by research, have been unknown in this field. It is a novelty, in that in all the cases on this point, the right of support for works placed in the ground has been derived from the authority of the Act under which they were placed there, and not from any other source. The right of support, irrespective of their type or weight, of works has arisen out of the right to construct them. Evershed J.'s novel ground of protection for the corporation as undertakers arises solely out of his attribution to the chamber encasing their works the natural right of support which is a feature only of land in its natural state. The very act of constructing the works and so creating the cavity as a separate entity must destroy the natural right of support, and thenceforward, so long as the works are there, the sole matter is the support of works which have taken the place of the excavated soil. [Somervell L.J. Where is the authority for the proposition that the pipes, once in the ground, remain, as chattels, the property of the undertakers ?] It would seem to follow from the Gas Works Clauses Act, and to have been assumed in the cases. Besides, it is difficult to imagine what else they can be. There is, however, no express decision on the point.

Clark K.C. following. The difficulty in construing s. 4 of the Act of 1883 lies in the words " by reason only of anything " contained in the Sanitary Act." The way to test whether a right arises only by reason of the Sanitary Act is to consider the position which would arise if that Act were suddenly repealed. Any right then left will not exist by reason only of the Act. If nothing remains, then the previous right must have existed only by virtue of the statute. The implied right of support on the *Normanton* (2) and *Dudley Corporation* (3) principle is a right introduced into the statute by implication. It would disappear with the Act itself because the only reason for its existence is that the Act imposes an obligation to maintain. Once the obligation, and even the right, to maintain goes, the right to support must also go. That is the simplest case. If, however, an easement has been acquired, it will rest

(1) 161 L. T. 186; 55 T. L. R. 1062.

(2) 52 L. J. (Q. B.) 629.

(3) 8 Q. B. D. 86.

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on a grant, which grant will remain in being after the statute has gone. The easement, therefore, is a right not arising by virtue of the statute. Again, a licence by the owner of the soil will survive the repeal of the Act unless conditional on continuance in force of the Act. [Somervell L.J. What would the position be if the right of support arose partly under the Act and partly in some other way ?] Such a right would still properly be said to arise only under the Act. Suppose that B enjoys a right of support apart from any statute: if by statute C acquires a right to share in the right of support vested in B, then C's right exists only by reason of the Act, for he has no right at all apart from the Act. If the mineowners are right in their contention here that the corporation are not in occupation of a stratum of soil, the corporation's only right of support must be the implied statutory right of support under the *Normanton* (1) and *Dudley Corporation* (2) principle. Assuming, however, that the corporation are in occupation of a stratum of land, and entitled to the natural right of support enjoyed by that stratum, the next question would be how they were in occupation of the stratum, and the answer would be that they were in occupation of it by their pipes, for it would not be a piece of surface land which they could occupy by walking over it, or by exercising any dominion over it other than the presence of their pipes within it. A chattel cannot be in occupation or possession of land. If a chattel is buried in a man's land without his authority, the owner of the chattel does not gain any occupation of the land, but loses the chattel, the property in which passes to the owner of the land, of which the chattel becomes part. That would have been the position with the corporation's pipes but for their Sanitary Act. Statute alone enabled these pipes to take up land without loss of the property in them. The occupation, if any, of land by the corporation takes place only by reason of the presence of their pipes through the operation of the Act. The corporation, therefore, if occupiers of any stratum, are statutory occupiers of it. [*Normanton Gas Co.* v. *Pope & Pearson, Ld.* (1) referred to.] [Morton L.J. It is surprising that there is no decision on the question in whom the property in pipes laid in one man's soil by another vests.] There seems to be no such authority; but, it is submitted, the effect is the same as with the building of a house: superficies solo cedit. It is not, however, necessary to this argument that the property in the

(1) 52 L. J. (Q. B.) 629. (2) 8 Q. B. D. 86.

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pipes should have passed to the owner of the soil. It is sufficient for present purposes to say that one man by putting a chattel on another man's land cannot obtain possession of the land on which he puts the chattel: he simply loses possession of the chattel. Thus, if their Sanitary Act were suddenly repealed, the corporation would cease to have through their pipes any occupation or possession of the stratum of soil or to have any right to maintain their pipes there at all. And it would seem that no action for trespass to the land would lie against anyone who dug up the pipes, and that the owner of the soil would clearly be entitled to do that. Thereafter, he could sell the pipes if they had passed to him as owner of the soil. Otherwise he would be entitled to dig them up and call upon the undertakers to remove them. That would seem to show that even if the corporation were in occupation of a stratum of the soil they were only in statutory occupation of it, their right being referable only to the statute. A right which is the creature of statute cannot be defined in terms of any of the conventional rights. It may be said to be like a licence or like an easement, but in fact it is really sui generis, and it is of no assistance to try and find a label for it. The only question is whether, if there were no statute involved, the corporation could maintain an action against the mineowners for nuisance.

Harman K.C. and *Wilfrid Hunt* for the corporation. In spite of the complications which always arise in matters between mineowners and statutory undertakers, the question at issue is really susceptible of being stated quite simply. As Evershed J. said, the success or failure of the corporation depends on whether they can show some right outside the statute, and it is submitted that they can. The judge has held that this is an ordinary common-law action for nuisance, and that the rights of occupation enjoyed by the corporation are sufficient to support such an action. That is all there is in the case. Everything would follow from that if it were right, which is why so much time was spent in the court below in investigating the right or status of the corporation as undertakers; for if it were a right or status sufficient in itself to support an action for nuisance for the withdrawal of support, the action would not rest on statute at all, the fact that the occupation derived from statute being immaterial. It is not the occupation which matters: it is the right of support. [Morton L.J. If you are in occupation because the statute has given you the right to be, does it follow that if the statute were repealed you would no

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longer be entitled to be there ?] It is submitted not. If the corporation had bought an easement in the land they would admittedly have a common-law right. It is argued against the corporation that because, instead of their having to buy the land or an easement over it, Parliament has thought fit to take a short cut by giving them a right by way of statutory licence in the land, their position is in some way different. The right to be in the land arises only by virtue of the statute, but the right to support has nothing to do with the statute. The land might or might not itself have a right of support. If under a statute a man puts his pipes into land which is liable to be let down by the owner of the minerals, either subject or not subject to payment of compensation, the statute will give no right to support except under the *Normanton* (1) or *Dudley Corporation* (2) principle. The copyholders here could restrain the lord of the manor from letting them down. They can pass that right to another : they can pass it to their lessee or his tenant, or they can grant it as an easement to whomsoever they please. Therefore anyone in the position of the corporation buying the land or an easement over it would automatically get the vendor copyholder's right of support. If the corporation had bought the right to run their pipes through the land, they would automatically have got all that the vendor could give them in connexion with that easement : *New Moss Colliery Co., Ld.* v. *Manchester Corporation* (3). If, therefore, a person either buying land or buying a right to run his pipes through land acquires a right of support because the vendor has it to give him, why does not a person occupying under the tenant's licence acquire a similar right ? [Cohen L.J. If he merely got a licence, would it carry with it the right to support ?] The licensee having an exclusive right of possession for the maintenance of his pipes in the land would acquire a right to support just as much as a person who had an easement, for it is sufficient to support an action of nuisance, the action appropriate to the withdrawal of support, that the plaintiff has occupation or possession of some portion of the land.

As for the question of occupation, supposing that the pipe in question, instead of running through the land, were a ten-foot sewer resting on the surface, no one would say that it did not occupy the land on which it lay. The pipes in question here are nine-inch pipes under the surface, and they similarly occupy the land on and against which they rest, below, on both sides

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(1) 52 L. J. (Q. B). 629.

(2) 8 Q. B. D. 86.

(3) [1908] A. C. 117.

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and on top. They do not merely occupy a cavity or chamber. They occupy the land which touches them all round and keeps them in place. No one would suggest that the gasometer at the end of the pipe does not occupy a portion of the surface. The difference between it and the gas pipes is merely one of degree. As was pointed out in one of the rating cases, the reservoir and the water pipes of a water company are in the same position except that one holds a much larger volume of water than the other. [Morton L.J. Presumably only quite a thin layer of land can be said to be in contact with the corporation's pipes. The point of difference between the mine-owners and the corporation here is that the latter contend that they occupy not only the cavity in which the pipes lie but also the cylinder of soil round the cavity.] All round it certainly, because all the surrounding soil helps to support the pipes. What reason can there be why a person having that amount of occupation of the land, if the land has a right to be supported by the subjacent and adjacent strata, should be unable to maintain an action for nuisance in the same way as the owner or copyholder of the land ? There is no substantial difference between an irrevocable exclusive licence, as here, and an easement, though the easement is no doubt an estate in the land whereas the licence would theoretically not be. The corporation should really be treated as having an easement, for that is in substance their position. They have an exclusive and irrevocable licence to occupy the land surrounding their pipes. It is quite wrong to call in aid a statutory implication where no such implication is required. If the land in which the corporation have the right to keep their pipes were liable to be let down by the mineral owner, the corporation would not acquire any right of support unless their statute gave it to them. Then, indeed, they would have to pray in aid the *Normanton* (1) and *Dudley Corporation* (2) principle ; but they do not need to invoke that principle having regard to the nature of the strip of soil which they occupy. Their Sanitary Act says nothing whatever about support. That it grants such a right is therefore a very big inference to make. [Somervell L.J. Your point is that it is not so much that there is no implied right of support as that the implication is to be restricted to cases where the laying of pipes does not bring with it a right to support ?] Yes. The essential question is whether the person having the statutory right to maintain his pipes in the soil can support an

(1) 52 L. J. (Q. B.) 629. (2) 8 Q B. D. 86.

action for nuisance quite apart from any considerations of statute. If that question is answered in favour of the corporation, the rest follows. The corporation's rights amount to the compulsory grant by the owner of the soil, the copyholder here, of an irrevocable licence to them to occupy by their pipes not only the chamber hollowed out to receive them, but all the land contiguous to them which supports them on every side. Even if the *Normanton* (1) and *Dudley Corporation* (2) principle did not exist, the corporation here would still have the right to bring an action of nuisance for the protection of their occupancy and their possession of that part of the soil which they occupy. [Morton L.J. Your argument is that you got into the land by reason of the provisions of the Sanitary Act, but that your right to support arises from something outside that Act, namely, the common-law right of support by virtue of occupancy of the strip of land ?] [Cohen L.J. You only depend on your Sanitary Act for your entry into possession and not for your right of support ?] Yes. My possession is admittedly a creature of statute, but that does not give me any right of support. If the corporation had happened to have their pipes in land which had not the right of support they would have had no right of support for their pipes. It is not the possession derived from the Act which gives the right of support ; it is the quality of the land in which the pipes are. The reason for the Act of 1883 was that the *Normanton* (1) and *Dudley Corporation* (2) principle resulted in undertakers who laid down pipes being faced with enormously increased expenditure due to claims for compensation which had to be paid at once. The Act was only intended to apply to cases where that mischief arose. The provisions about giving notice and keeping maps and plans are obviously in point where the mineowner needs to know what he is going to let down next. There is no point in them where he has no right to let down the surface. The Act of 1883 does not apply to such a case. The corporation have a right of support which emanates from the nature of the land, not from any statute. The argument is fallacious that because their right to put their pipes in the soil is the creature of statute everything else flows from statute. [Somervell L.J. Do you say that it is as if the statute had given a power of compulsory purchase of land, with which land a right of support is acquired ?] Yes, as in *New Moss Colliery Co., Ld.* v. *Manchester Corporation* (3). The

(1) 52 L. J. (Q. B.) 629.
(2) 8 Q. B. D. 86.
(3) [1908] A. C. 117.

position is simply that Parliament has said that the undertaker, instead of getting a conveyance, has the right to maintain his pipes in the soil by virtue of a statutory licence. [Cohen L.J. In the case of a compulsory purchase there is a conveyance, and a conveyance is something outside statute.] It is submitted that the conveyance would be the creature of statute, because there would be no conveyance without the statute. What the corporation have outside statute is the quality of land into which they put their pipes. While compulsory purchase takes place by means of a conveyance, a statute may contain a vesting provision doing away with the necessity for a conveyance. In either case the statute is the empowering instrument, but the nature of the right acquired under the statute does not of itself give a right to support. That depends on the rights of the acquiring body's predecessor in title. [Morton L.J. If there is no right to support, the statute will imply it in their favour.] But if they have a right to support there is no need to have recourse to the statute at all.

The Act of 1883 was intended to help local authorities by saving them heavy outlay by way of compensation. The mineowners here seek to use the same Act against them. The Act is only concerned with undertakers on the one hand and mines on the other hand. The land here, down to where the first mineral seam occurs, is by the local law entitled to be left undisturbed by any digging of the minerals beneath. The corporation, when they acquired their right, whatever it was, to put their pipes in the land, did need support for them against, for instance, a copyholder wishing to make a cellar or to construct an underground railway beneath them. For that support the corporation would have to rely on the *Normanton* (1) and *Dudley Corporation* (2) principle because they acquired no other right of support from the strata immediately beneath them. The copyholders therefore became entitled to compensation from the corporation. One of the elements in assessing that compensation would be that the copyholder's land was immune from disturbance by the mineowner. The copyholder obviously had more to give the corporation than would be the case if his land were liable to be let down by the mineowner. On payment of that compensation, if demanded, the corporation would surely get all that the copyholder had to give them, namely, a right, licence, or wayleave, which is what the right more nearly resembles, over his land, with a right to be supported

(1) 52 L. J. (Q. B.) 629. (2) 8 Q. B. D. 86.

as he was supported by the minerals underneath. The authorities show that if the corporation had bought a strip of land, say about a foot wide, for the laying of their pipes, and had taken a conveyance of it, that conveyance would have given them all the rights of support which the vendor had to give. It can make no difference that the pipe has been put in under a licence or a wayleave and not through a purchase of land. The corporation's position as against the copyholders is distinct from that as against the mineowners. The pipes, once in, might be let down by a copyholder who chose to dig a cellar beneath them. As against him the corporation would have to rely on the statutory right to support for the pipes on the *Normanton* (1) and *Dudley Corporation* (2) principle. That statutory protection is acquired subject to a right in the copyholders to compensation, which they have not in fact demanded; but as against the mineowners the corporation's position is different because the mineowners have no right to let down the land in which the pipes are. The Act of 1883 is applicable only where mines are in question. Section 4, therefore, does not take away from the corporation as against the copyholders their right to support for their pipes under the *Normanton* (1) and *Dudley Corporation* (2) principle. The corporation have put their pipes into sacrosanct soil, where they are protected from being let down by the local law which is the common law for that district. The corporation's right is analogous to an easement and can be most accurately described as a statutory wayleave, the right to pass gas by means of a pipe through another man's land. That is a right giving the corporation sufficient status to maintain their action for nuisance. [*Clippens Oil Co.* v. *Edinburgh and District Water Trustees* (3) referred to with reference to wayleave.]

The corporation's pipes become part and parcel of the land in which they are laid, but the property in them is kept in the corporation for the purpose of their statutory undertaking. If they ceased to carry it on they would not be entitled to break up the land and remove the pipes. The property in them remains in the corporation only for their convenience as undertakers in maintaining them. [Somervell L.J. If the pipes are still chattels and the corporation's property, can damage to them be claimed for even though they are resting on land which has a right of support?] We do not claim damages on that basis. They are not chattels; they are part and parcel

(1) 52 L. J. (Q. B.) 629.
(2) 8 Q. B. D. 86.
(3) [1904] A. C. 64.

of the land. It is only in the peculiar circumstances of this case, in view of the necessity for maintenance, that the corporation retain property in them. [Somervell L.J. A man may well have a right to the support of the surface, but can he claim damages for injury to a chattel on the surface which is let down ?] The corporation are not claiming damages for that, but for the letting down of the land on which the chattel rests. Part of the damage done is the injury to the chattel ; that will be covered by the action for nuisance ; it is damage flowing from the tortious act of the defendant, and it is immaterial whether the pipes are chattels or not. In the analogous action for nuisance to ancient lights, the damages recoverable for the defendant's tort are not confined to the obscuring of the lights in the house which are ancient lights. Damages can be recovered for every window darkened by the tortious act. [*Charing Cross Electricity Supply Co.* v. *London Hydraulic Power Co.* (1), Halsbury's Laws of England (Hailsham ed.), vol. 27, p. 355, para. 786, Ryde on Rating (8th ed.), p. 419, *R.* v. *Mersey & Irwell Navigation Co.* (2) and *R.* v. *Chelsea Waterworks Co.* (3) referred to.] Those authorities throw light on the position of those who have an exclusive right to run pipes through another person's soil. The corporation are suing on their own right, not on someone else's. They are not saying that, though they do not occupy the land, yet it is entitled not to be let down, and that they, happening to be on it, are entitled to recover if it is let down in defeasance of the right attaching to it. The corporation are claiming in their own right because of their exclusive right of occupation. They are not leaning on someone else's right. Their occupation gives them a right of their own. Jus tertii does not come into the case at all. Winfield in his book on Tort defines nuisance as unlawful interference with a person's use or enjoyment of land, or of some right over or in connexion with it, a definition which received judicial approval in *Read* v. *J. Lyons & Co.* (4). The corporation are in enjoyment of a right over or in connexion with the land. [*Malone* v. *Laskey* (5) referred to.] [Somervell L.J. Is there authority for the proposition that a permission to lay pipes is an estate or interest in land known to the law ?] The rating cases, it is submitted, go as far as that. One can be rated because one is in occupation of part of land ; and to have a right of action for nuisance one only has to show occupation or possession. [*In re Dudley Corporation* (1) and *Normanton Gas Co.* v. *Pope & Pearson, Ld.* (2) referred to.] It was in *New Moss Colliery Co., Ld.* v. *Manchester Corporation* (3) that it first became realized that the so-called mining code of the Water Works Clauses Act does not cover every case. That case established that if one buys a right one acquires everything that the vendor has to sell. [*Hargreaves (John), Ld. (Executors)* v. *Burnley Corporation* (4) referred to.] No one suggested there that the Act of 1883 was any bar to the common-law rights which remained in the local authority. The land supporting the gas and water works had been taken under a conveyance. The undertaker's rights did not arise by reason only of statute. The undertaker's position is the same whether he gets his rights under statute or not. Because rights are granted by virtue of a statute it is no more correct to say of the corporation here than it was of Burnley Corporation to say that their rights arise only by statute. There is no distinction between a conveyance appertaining to the land and a licence arising by reason of something done under statute. It is merely the acquisition of rights by a different road.

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(1) [1913] 3 K. B. 442.
(2) (1829) 9 B. & C. 95.
(3) (1833) 5 B. & Ad. 156.
(4) [1945] K. B. 216, 236.
(5) [1907] 2 K. B. 141.

Finally, it is submitted that the mining code only extends to forty yards on either side of the works in question. The Act of 1883, it is submitted, has no application outside that limit: see *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (5). The damage cannot be confined to forty yards from the works, for in fact the whole of it, as Evershed J. found, was attributable equally to working outside that limit. If the corporation are right on this point, it goes to the whole of their claim. In *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (5) it appeared for the first time that, in spite of the mining code, the railway company retained their common-law rights outside the forty-yard limit. [Judgments in *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (5) read in extenso, and *Wath-upon-Dearne Urban District Council* v. *John Brown & Co., Ld.* (6) referred to.] If the corporation had bought a strip of land and put their pipes into it instead of making use of the statutory power to put the pipes into the land, the present case would have been exactly within *Wath-upon-Dearne Urban District Council* v.

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(1) 8 Q. B. D. 86.
(2) 52 L. J. (Q. B.) 629.
(3) [1908] A. C. 117.
(4) (1936) 156 L. T. 41.
(5) [1913] A. C. 11.
(6) [1936] Ch. 172.

John Brown & Co., Ld. (1). While that case is, in a way, pertinent to the main point on this appeal, reliance is chiefly placed on it for the proposition that the code has no application outside the forty-yard limit. *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (2) and *Wath-upon-Dearne Urban District Council* v. *John Brown & Co., Ld.* (1) it is submitted, show that, outside the forty-yard limit, the code has no application. The common-law rights of support remain unaffected by the code. The Act of 1883 imports this code which is so limited, and so s. 4 should be construed as referring only to the area to which the code is limited. Even if the corporation's rights of support were merely those under the *Normanton* (3) and *Dudley Corporation* (4) principle, the code would not apply outside the forty-yard limit, and ss. 3 and 4 of the Act of 1883 only refer to code rights and rights of support within that area. The argument that the Act of 1883 does not apply outside the forty-yard limit does not rest only on the words "except as in this Act "provided." The whole Act is only referable to code rights. Since the Act incorporates the whole code with its forty-yard limitation, and since *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (2) lays down that the code does not affect the rights and liabilities of parties outside the forty-yard limit, s. 4 must surely be construed as referable only to the subject-matter of the whole Act. [Cohen L.J. Can it rightly be said that *Wath-upon-Dearne Urban District Council* v. *John Brown & Co., Ld.*(1) decided more than that the code has nothing to do with natural rights outside the forty-yard limit ? The implied statutory right under the *Normanton* (3) and *Dudley Corporation* (4) principle was not under consideration ?] The answer is that, once an undertaker has in his favour the implication made under that principle, the rights which he gets are the same as natural rights. They are common-law rights despite their statutory origin. The rights to be implied as granted by the legislature are the common-law rights of support vertically and laterally.

In one way or the other the corporation should succeed, and either the appeal should be dismissed, or the cross-appeal should be allowed.

Sir Cyril Radcliffe K.C. replying. The right of support under the *Dudley Corporation* (4) and *Normanton* (3) principle is not

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(1) [1936] Ch. 172.
(2) [1913] A. C. 11.
(3) 52 L. J. (Q. B.) 629.
(4) 8 Q. B. D. 86.

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the same as a common-law right of support if one means by that the natural right of support for the surface in its undisturbed state. The right of support under that principle is for the works themselves whatever they may be. Admittedly the obligation on those who have to give the support is the same in either case. The argument for the mineowners is not in conflict with *New Moss Colliery Co., Ld.* v. *Manchester Corporation* (1), *Wath-upon-Dearne Urban District Council* v. *John Brown & Co., Ld.* (2), *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (3) and *Hargreaves (John) (Executors), Ld.* v. *Burnley Corporation* (4). An undertaker's becoming the owner of land carries with it the pre-existing rights of support admittedly, notwithstanding s. 4 of the Act of 1883. The crucial question, however, is whether it is right to treat an undertaker who has occupied land with pipes under statutory powers as if he had bought land with its attendant rights, having regard to s. 4. In *Wath-upon-Dearne Urban District Council* v. *John Brown & Co., Ld.* (5), Luxmoore J. refers to *New Moss Colliery Co., Ld.* v. *Manchester Corporation* (1), as a decision that an undertaker purchasing land by agreement expressly including the subjacent minerals is not affected by the mining code. That is not quite an accurate statement because that case was an interpretation of the code. It would have been more accurate to say that the decision was that the undertaker was entitled by virtue of the code to fall back upon whatever common-law right he possessed.

It is difficult to see how any question of the forty-yard strip can arise on s. 4 of the Act of 1883. *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (3) and *Wath-upon-Dearne Urban District Council* v. *John Brown & Co., Ld.* (2) show that the effect of imposing the code is that within the prescribed area, i.e., within the forty-yard limit, the notices to be given are so complete in their definition of the rights of the respective parties that, subject to the saving provisions of s. 5, they destroy what would otherwise be the position at common law with regard to support. *Howley Park Coal & Cannel Co.* v. *London & North Western Ry. Co.* (3) decided only that if the undertaker had bought land having a right of support the displacement by the code of that common-law nexus within the forty-yard limit did not affect the rights attaching to his land outside that limit. Section 3 of the Act of 1883 incorporated the Water Works Clauses Act into itself, but that does not mean

(1) [1908] A. C. 117.
(2) [1936] Ch. 172.
(3) [1913] A. C. 11.
(4) 156 L. T. 41.
(5) [1936] Ch. 192.

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that s. 4 is limited in its application to the area to which the Water Works Clauses Act is referable. The words in s. 4 " except as in this Act provided " were construed in *Jary* v. *Barnsley Corporation* (1) as looking to s. 5, the saving section. Those words cannot be interpreted as meaning " within the area " to which the code in the Water Works Clauses Act applies." To restrict the application of s. 4 to the forty-yard limit would be to defeat the admitted purpose of the Act of 1883.

As for the main point, it would be a mistake not to have clearly in mind that the rating decisions all proceed on the view that the undertakers' pipes had become annexed to the freehold and become part of the soil. That means that the undertakers lost their property in the pipes through fixing them to the freehold in which admittedly they had no estate. Having, therefore, improved the freehold by affixing their pipes to it, the undertakers had a statutory right of occupancy of the content of the pipes, which was sufficient to make them liable for rates as occupiers of land, the land in question being the cavity into which they put their pipes. [*R.* v. *Brighton Gas Light & Coke Co.* (2) referred to.] The rating decisions cannot form the basis of the corporation's claim here, for they are claiming that the pipes are vested in them and that their property has been damaged. [Morton L.J. If they are occupying with pipes a piece of land in respect of which they have certain rights, interests and duties, why cannot they recover damages if someone injures the pipes ?] The damages claimed are not loss of profit through damage to their apparatus, but for damage to the property itself. If that property in fact belongs to the owner of the freehold, as in the rating cases, they cannot claim damages in respect of it. [Cohen L.J. Not even if they have an exclusive right to use the pipes ?] No. If the property in the pipes is in the owner of the land, then damage to the pipes is damage done to him. [Somervell L.J. Surely it is unreal to say that if you have a right to put a thing, whether it remains your property or not, into or on to the soil, you are not in occupation of the soil on which the thing rests ?] Yes, in the case of the surface, but not in the case of strata beneath the surface. How much of the subjacent strata are the corporation to be said to occupy ? If, for example, the owner of the strata extending down to the cavity digs down as far as the pipe but does not touch it, he cannot be said to have committed a trespass. Something which is not land, as the corporation's pipes are not, cannot enjoy a natural right of support. If the corporation by their pipes are to be said to occupy strata below them, it may well be asked, how many strata? To that the answer, surely, could only be, as many as are necessary for support, which again brings in the right to support which the pipes, as chattels, cannot have. The corporation have nothing but a cavity, and the pipe in its cavity is a special work which, as such, cannot command any right to support. It can only be included in damages for the withdrawal of support from land which has a natural right to it [Somervell L.J. Why, if the corporation are admitted to be in occupation of a space in the soil, are they not just as much entitled to a right of support as if they occupied a space on the surface of the soil?] If the pipe is laid on the surface the undertakers occupy the surface on which it rests, and that surface may have a natural right of support. But the space hollowed out in the land here has not a right of support. To say that that cavity had a right of support would be meaningless. [Somervell L.J. If a trench were dug to receive a pipe, that would have a right to support?] Yes, but it would be the bottom of the trench which had that right, that is, the surface left. It could not be the trench as a cavity which had the right. If a pipe rests on undisturbed land the occupier has a claim if the land is let down. Similarly, if the undertaker digs a trench for the pipe, the soil along the bottom of the trench has a right to support. But a cavity below the surface cannot have such a right. [On the contention that the occupation by the pipes was occupation of the space taken up by them and not of the land on which they rested, *R.* v. *Mersey & Irwell Navigation Co.* (1), *R.* v. *Chelsea Waterworks Co.* (2) and *Holywell Union* v. *Halkyn District Mines Drainage Co.* (3) referred to.] The right which the corporation get under their Sanitary Act is not thought of by the legislature as a right which they are to inherit by grant from the previous owners of the soil. The right is one created by statute itself, the right to enter and lay pipes. If there had been any question of taking property and vesting it in the undertakers, the procedure under the Lands Clauses Act for taking land would have had to be gone through. The right to sue for support cannot be separated from the statutory right to occupy. The argument for the corporation is that the mere absence of a scrap of paper in the form of a conveyance makes no difference, but, it is submitted, it does make a vital difference: it is the difference between being a successor by assignment from the former owner and being in occupation by virtue merely of a statutory right which has no relationship to owning land.

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(1) [1907] 2 Ch. 600.

(2) (1826) 5 B. & C. 466, 469.

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(1) 9 B. & C. 95, 112.

(2) 5 B. & Ad. 156, 169.

(3) [1895] A. C. 117, 133.

If the occupation by the corporation with their pipes is an easement or wayleave, *Paine & Co.* v. *St. Neots Gas Co.* (1) is direct authority for the proposition that you must establish the source of your easement if you are to sue for nuisance. [Morton L.J. Can the corporation not point to s. 6 of their Sanitary Act as the authority from which their easement arises?] In that event they point to a statutory right which is replaced under s. 4 of the Act of 1883. The corporation's case rests on their being able to discard the statutory authority and rely solely on occupation as such; but if they wish to set up their easement or wayleave, then, on the authority of *Paine & Co.* v. *St. Neots Gas Co.* (1), they must set up the instrument or other source of their easement or wayleave as a condition of maintaining their action of nuisance. It is a fallacy for the corporation to say that, because there is inherent in the land by custom a right to support, they, as occupiers, need not rely on the source of their occupation, but need merely assert it to maintain their action. That is a fallacy because land does not own rights: persons own rights in respect, among other things, of their land. The whole scheme concerns the laying of pipes over a great area. The conception of allowing the position in relation to those pipes to depend on the rights of the owners of the soil with whom the statute brings the corporation into relation, with none of the procedure, including investigation of title, under the Lands Clauses Act, being followed, is foreign to the whole idea of the mining code introduced from the Water Works Clauses Act. [*Gas Light & Coke Co.* v. *St. Mary Abbotts, Kensington, Vestry* (2) referred to on the question in whom the pipes are vested.]

Cur. adv. vult.

1947. Jan. 21. MORTON L.J. [after stating the facts substantially as above set out:] By s. 4 of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, which is headed: "Limitation of right to support "for sanitary works over mines," "Except as in this

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(1) 161 L. T. 186; 55 T. L. R. 1062.

(2) (1885) 15 Q. B. D. 1.

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"Act provided, a local authority shall not by reason "only of anything contained in the Sanitary Act under the "authority of which a sanitary work has been or is constructed "or maintained be deemed to have acquired or to be entitled "to or be bound to acquire or to make compensation for any "right of support for such sanitary work as against any person "owning or working or being lessee or occupier of or entitled "to work or otherwise interested in any mine; and nothing "in such Sanitary Act shall be deemed to have subjected or "to subject any such person to any liability to the local "authority in respect of damage to a sanitary work caused in "or consequent upon the working of any mines in a reasonable "and proper manner." By s. 5, which is headed "Savings," "Nothing in this Act shall be construed to repeal, invalidate, "or affect any express enactment in a sanitary or other Act "with respect to rights of support for sanitary works, or any "agreement made before the passing of this Act with respect to "such rights, or to affect any action, arbitration, or other "legal proceedings concluded before or pending at the passing "of this Act. Where any right of support has been acquired "before the passing of this Act by a local authority in respect "of any sanitary work, and no compensation is at the passing "of this Act recoverable in respect of such right, nothing in "this Act shall be construed to apply to the work in respect "of which such right has been acquired, or operate to deprive "the local authority of such right or to entitle any person to "any compensation in respect thereof, to which such person "would not have been entitled if this Act had not been "passed."

The main question on the appeal is one of some difficulty, and the court has had every possible assistance from the interesting arguments of counsel on both sides. I think that the contentions before us may be summarized as follows. The company's contentions are: (1.) the corporation can make no claim against the company under any of the provisions of the Act of 1883, or of the so-called mining code incorporated therewith by s. 3 thereof, because the corporation and their predecessors have failed to comply with s. 19 of the Water Works Clauses Act, 1847, as modified by s. 3, sub-s. 3, of the Act of 1883. (2.) The corporation could only obtain a right of support against the company under the principle laid down in *Normanton Gas Co.* v. *Pope & Pearson, Ld.* (1)

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(1) 52 L. J. (Q. B.) 629, 633.

where Brett M.R. said: "When the legislature has given power "to do something, the execution of which requires of necessity "subjacent support from the land, then the persons who are "authorized to execute the powers given by the Act get also "a right as against the landowner to the necessary subjacent "support." This implied grant of a right to support, says the company, arose "by reason only" of the corporation's Sanitary Act within s. 4 of the Act of 1883, and, therefore, it was swept away, as against the mineowners, by that section. (3.) The corporation had no other right of support, therefore this action must fail.

The corporation admit contention (1.) but seek to meet contentions (2.) and (3.) by the following line of argument: (1.) On laying their pipes in the soil the corporation or their predecessors in title became the occupiers not only of the cavity occupied by those pipes but of the contiguous soil which surrounded those pipes. (2.) The owners of that soil had a right of support at common law as against the company: see *Hilton* v. *Earl Granville* (1), and the corporation, as occupiers of that portion of the soil which was contiguous to its pipes, were entitled to that natural right of support. (3.) Being entitled to that natural right of support, the corporation never required or acquired any implied statutory right of support against the company under the *Normanton* (2) principle. (4.) The right mentioned under (2.) above was unaffected by s. 4 of the Act of 1883, because it was not a right arising by reason only of anything contained in the corporation's Sanitary Act, within the meaning of s. 4 of the Act of 1883.

The line of argument expresses, in substance, the view which was taken by Evershed J., and, as I am in agreement with his reasoning up to a certain point, it will be convenient to set it out in his own words. He referred to ss. 6 and 7 of the Gas Works Clauses Act, 1847, and continued (3): "To the contrast "with s. 6 of the Act of 1847 provided by s. 7 must be added "the further contrast provided by s. 10 of the Gas Works "Clauses Act, 1871, giving power to the undertakers as therein "provided to acquire easements by agreement; and the latter "contrast is reflected in the express powers to be found, for "example, in the Burslem Local Board Gas Act, 1877, and the "Newcastle-under-Lyme Corporation Act, 1877, to acquire "easements by agreement and also, subject to the strict limits

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(1) 5 Q. B. 701.
(2) 52 L. J. (Q. B.) 629, 633.
(3) Ante p. 102, 103.

"imposed, to acquire land: see, for example, ss. 10 and 11 of "the Burslem Act, and ss. 48 and 49 of the Newcastle Act. "I add that the exercise of all the powers to which I have "referred must plainly be limited by reference to the purpose "of the gas undertakers, that is, the supply of gas, and would, "therefore, come to an end if the undertakers ceased to carry "on such undertaking. In these circumstances and bearing "in mind the general rule that no greater rights or interests "should be treated as conferred upon the undertakers than are "necessary for the fulfilment of the object of the statute, it "seems to me reasonably clear, as a matter of the construction "of s. 6 of the Act of 1847, that the terms of the section are "not intended to confer and are not apt to confer upon the "undertakers any right of ownership or proprietorship of the "land affected. Equally, in my judgment, is the language of "the section inappropriate to create in favour of the under-"takers any tenancy or any easement or interest analogous to "an easement. It is true that the rights of the undertakers "are the creatures of statute, and that it is within the compe-"tence of Parliament to confer or create interests without "regard to those incidents which are regarded as requisite to "an agreement inter partes. Thus, Parliament may create an "easement in gross as it may, I assume, create a tenancy with-"out provision for the payment of rent and notwithstanding "the absence of any term certain. But the absence of the "incidents ordinarily appropriate to the existence of a tenancy "or of an easement is, at the least, an important consideration "for the determination of the question whether upon the true "construction of the statute the creation of any such interest "was intended. It is, indeed, somewhat tempting to infer that "some right in the nature of an easement ought to be inferred; "and I have in mind the reference to a wayleave in the speech "of Lord Atkinson in *New Moss Colliery Co.* v. *Manchester* "*Corporation* (1). But in my judgment these considerations "are insufficient to give to the language of s. 6 of the Act of "1847 a meaning and intent which that language, particularly "in the light of the contrasts to which I have already referred, "cannot naturally or properly bear." I agree with the passage just quoted. Later, the judge expressed the view, with which, again, I agree, that the corporation had no title, legal or equitable, in the land itself.

He then referred to a number of decided cases and

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(1) [1908] A. C. 117, 124.

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continued (1): " I have dealt at some length with this aspect " of the matter since there appears to be in the books no " authoritative pronouncement upon the true nature of the " interest in or relating to the land of persons or corporations " authorized by statute in the terms of s. 6 of the Act of 1847, " or of other comparable statutes, to lay pipes or cables under " highways. I venture to state my conclusion upon the position " of the plaintiff corporation as follows: they have by force " of the statute the exclusive right to occupy for the purpose " of their statutory undertaking the space in the soil taken by " the pipes and that (subterranean) part of the soil on which " the pipes rest; but that exclusive right of occupation, which " continues so long as the corporation carry on their undertaking, does not depend upon or involve the vesting in the " plaintiff corporation of any legal or equitable estate in the " land. If the language in note (*a*) to para. 786 at p. 355 of " vol. XXVII. of Halsbury's Laws of England (Hailsham Ed.) " is to be taken to imply that persons or corporations who " have laid pipes or cables under statutory powers similar to " those applicable to the plaintiff corporation and their " predecessors in the present case have an interest in the land " of the nature of an easement and that the rating decisions " proceed from such a view, I do not think that such a conclusion is justified, and I find myself unable to accept it."

I accept the whole of this reasoning, with the vital exception that I do not accept the judge's reference to " that " (subterranean) part of the soil on which the pipes rest." This is, in my view, the crucial point at which the corporation's line of argument breaks down. I do not think that the corporation have the exclusive right to occupy anything except the space which is filled by their pipes. To test this, let me assume that some person, not authorized by the corporation, removed all the soil round a portion of the corporation's pipe, being careful to do no damage to the surface of the pipe and providing sufficient support to prevent any damage by subsidence. Could it be said that that person had committed a trespass against the corporation? In my judgment, no. If this is so, it seems to follow that the corporation have not the exclusive right to occupy any part of the soil by which their pipes are surrounded. I may add that if, as Mr. Harman suggested, the corporation are the occupiers of a " cylinder " of soil round their pipes, I can find no satisfactory answer to the question " How thick is that cylinder?" Evershed J.

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(1) Ante p. 106.

went on to say (1): "It follows that the plaintiff corporation "cannot, in my judgment, say . . . . that they are, as "Mr. Harman puts it, the inheritors of the right of support "admittedly vested in the owners of the surface land." I have omitted a few words which I find difficult to understand, but they do not, I think, affect the sense of the observation just quoted, with which I entirely agree.

To sum up, accepting as I do the reasoning of Evershed J. with the one vital exception which I have mentioned, we agree: (*a*) That the corporation have no right of ownership or proprietorship of the soil in which their pipes are laid; (*b*) that they are not the tenants of any part of that soil; (*c*) that no easement is vested in the corporation; (*d*) that the corporation have no title, legal or equitable, in that soil; and (*e*) that the corporation are not the inheritors of the right to support admittedly vested in the owners of the surface land. Further, in my view, and here I differ from the judge, the corporation have not the exclusive right to occupy any portion of that soil, as distinct from the space or cavity occupied by their pipes.

To what conclusion do these findings lead? They lead me to the conclusion that the corporation never acquired any right of support against the company except the implied right arising from the exercise of the corporation's statutory powers, as explained in *Normanton Gas Co.* v. *Pope & Pearson, Ld.* (2). I think that Evershed J. might have arrived at the same conclusion if he had thought, as I do, that the corporation are not in exclusive occupation of any part of that soil in respect of which there exists a natural right of support as against the company. As I have said, all that the corporation have the right to occupy, and do occupy, is a cavity in the ground, which is entirely filled by the pipes in question. A cavity cannot have attached to it a natural right to support—it is merely an empty space; nor can a gas pipe, although a right to have it supported may be acquired in other ways, e.g., by statute or by prescription. I should add that it was not contended on behalf of the corporation that any prescriptive right to support had arisen in the present case. If I am right so far, it follows that the corporation's line of argument breaks down at an early stage. In my judgment, the only right to support, as against the company, which the corporation possessed up to 1883 was the implied right to support under the *Normanton* (2) principle, and that right was swept away by s. 4 of the Act of 1883. It was a right which the corporation were deemed to have acquired or be entitled to by reason only of the provisions of the Sanitary Act under the authority of which the corporation's sanitary works were constructed. It is true that s. 4 did not affect any right to support which the corporation acquired under the *Normanton* (1) principle, as against the owners of the soil lying over the mines since that section only deals with rights of support as against persons working mines; but that fact does not assist the corporation in the present action. In my view the action should have been dismissed on the ground that the corporation had failed to establish any existing right to support as against the company.

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(1) Ante p. 106.

(2) 52 L. J. (Q. B.) 629.

Evershed J., in a closely-reasoned judgment, arrived at a conclusion in favour of the corporation. I think that the basis for his decision was that the corporation had possession of some part of a stratum of soil which enjoyed a natural right to support. That right was, he thought, enough to entitle the corporation to maintain an action for damage to the pipes, suffered as a result of the company's interference with " the natural right of " support attaching to the surface land." With respect, I cannot accept his premise, and his conclusion seems to me inconsistent with his view that the corporation were not the " inheritors " of that natural right of support. I think that he was influenced in forming his view as to the corporation's rights to possession of part of the surface land by certain cases as to the liability of gas undertakers for rates. For my part, I find nothing in these cases which leads me to doubt the correctness of the view which I have just expressed.

When it was said by Denman C.J. in *R.* v. *Chelsea Waterworks Co.* (2) that they, the undertakers, " have the exclusive " right in a portion of the soil," he was not referring to anything more than the space occupied by the pipes, and the pipes themselves. In the same passage, Denman C.J. remarked, " the company are, on the authority of the decided case, the " occupiers of the land filled by the pipes." Again, in *Holywell Union* v. *Halkyn &c. Drainage Co.* (3), Lord Davey said: " The " real question is . . . . whether the company is de facto in " occupation of some portion of the soil," but in the same speech he said: " I cannot doubt that the company occupy, " with their tunnel, the portion of ground in which the tunnel

(1) 52 L. J. (Q. B.) 629.
(2) 5 B. & Ad. 156, 169.
(3) [1895] A. C. 117, 133.

"is constructed, and also those portions which are enclosed "within the tunnel, and used by the company for the purpose "of their undertaking." He had quoted with approval the statement of the law by Wightman J. in *Reg.* v. *West Middlesex Waterworks* (1): "In this case the first question is whether the "company are rateable for their mains, which are laid under "the surface of the highway, without any freehold or leasehold "interest in the soil thereof being vested in the company. "We think they are. These mains are fixed capital vested in "land. The company is in possession of the mains buried in "the soil, and so is de facto in possession of that space in the soil "which the mains fill"—and I draw particular attention to these words—"for a purpose beneficial to itself. The decisions "are uniform in holding gas companies to be rateable in respect "of their mains, although the occupation of such mains may be "de facto merely, and without any legal or equitable estate in "the land where the mains lie, by force of some statute."

I do not think that any one of the cases cited before us bears out the proposition that the corporation have the exclusive right to possession of the soil surrounding the pipes, as distinct from the pipes themselves and the cavity which is filled by the pipes. Further, it does not appear that the proposition was put forward in any of the cases in which undertakers were claiming a right to support. I would add this: even if I had agreed with the judge's view that the corporation had possession of some part of the soil, as distinct from the cavity occupied by its pipes and the pipes themselves, I should still have felt some doubt as to the correctness of his conclusion. I was impressed by the final argument of Sir Cyril Radcliffe that the applicability of s. 4 of the Act of 1883 cannot depend upon whether owners of the soil in which the pipes are laid did or did not possess a right of support, in respect of that soil, as against the owners of subjacent mines. He pointed out that when a long stretch of pipe is laid, portions of it might be in soil which could not be let down, and other portions might be in soil which could be let down, and he suggested that it would be an artificial construction of s. 4 to regard it as having had effect in the case of the latter portions but not in the case of the former portions.

I think, also, that there is much to be said for the argument that, even if the corporation had such a right of support as the judge held to exist, that right of support existed by reason only

(1) (1859) 1 E. & E. 716, 720.

of the provisions in their Sanitary Act [of 1847] under the authority of which their pipes were laid. It seems to me a somewhat narrow distinction to say, "True, our right to lay "and maintain these pipes arose by virtue of the Sanitary "Act, and we could not have obtained our right to support at "common law unless we had first been empowered to lay and "maintain our pipes in this piece of land. Still, our right "to support does not arise by reason only of anything contained "in that Act." This distinction may, however, be justified by the word "only" which appears in s. 4; it is not necessary for me to arrive at a final conclusion upon the arguments just mentioned, as I have already arrived at the conclusion that the corporation never had any right of support except the implied right which arose under *Normanton Gas Co.* v. *Pope & Pearson, Ld.* (1).

I cannot feel that the conclusion at which I have arrived involves any injustice. The corporation would have had the extensive protection afforded by ss. 18 to 27 of the Water Works Clauses Act, 1847, as modified by the Act of 1883, if the provisions of s. 19 of the Act of 1847, as modified by s. 3, sub-s. 3, of the Act of 1883, had been carried out. Moreover, neither the corporation nor their predecessors in title ever went to the expense of acquiring a grant of the portion of the land in which their pipes are situate, or of an easement of support for those pipes. The view which I have formed seems to me to agree well with the scheme embodied in the Act of 1883. I think that the legislature had in mind the object of substituting the protection of the mining code for the kind of right to support which had previously been enjoyed by the corporation in the present case.

I must now consider the two subordinate issues which I have already mentioned, and I can deal with them shortly, as I find myself in agreement with the views of Evershed J. on this point. The first of these issues is whether the corporation, if they fail on the main issue in the action, are entitled to damages in respect of damage to any pipes laid before the passing of the Act of 1883. Mr. Harman relied upon the judge's finding that some at least of their damaged pipes were laid before the passing of the Act of 1883. He argued that no compensation was or could ever have been payable in the circumstances in respect of these pipe-laying operations, and, accordingly, that the following portion of s. 5 of that Act applied to the pipes so laid:

(1) 52 L. J. (Q. B.) 629.

"Where any right to support has been acquired before the "passing of this Act by any local authority in respect of any "sanitary work, and no compensation is at the passing of this "Act recoverable in respect of such right, nothing in this Act shall "be construed to apply to the work in respect of which such "right has been acquired." I agree with the judge's reasons for rejecting that argument, and I do not desire to add to those reasons. In brief, he did not accept Mr. Harman's proposition that no compensation was, or would ever be, payable in respect to the laying of pipes during the pre-Act period.

The second of those issues is whether the corporation, assuming that they are prevented by s. 4 of the Act of 1883 from recovering damages for any damage to their pipes occasioned by the workings of minerals within the distance of forty yards, could still recover damages in so far as the damage was occasioned by workings of minerals outside a distance of forty yards. Mr. Harman contended that, on the true construction of s. 4, its operation did not extend to land more than forty yards from the sanitary work in question, and that the corporation still retained their right to support under the *Normanton* (1) principle as against any person working mines outside the forty-yards limit. I cannot accept this argument. It seems to me that there is nothing in s. 4 which would justify the court in limiting its operation in the manner suggested by Mr. Harman. The words are "*any* right to support for such "such sanitary work as against any person owning or working "or being lessee or occupier of or entitled to work or otherwise "interested in *any* mine." The italics are mine, and these words seem to me as wide as they could well be. With regard to the opening words "Except as in this Act provided," I can find nothing in the provisions of the Act outside s. 4 which supports Mr. Harman's argument.

The result is that, in my view, this appeal succeeds and judgment ought to have been entered in the action for the company.

Cohen L.J. has read the judgment which I have just delivered and has asked me to say that he agrees with it.

Somervell L.J. I will not recapitulate in full the facts and history of this appeal, which have been fully stated by my brother Morton. In order to decide whether the corporation have, as against the company, the right of support on which

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(1) 52 L. J. (Q. B.) 629.

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their claim for damages is based, it is necessary to consider their rights apart from the Public Health Act, 1875, (Support of Sewers) Amendment Act, 1883, and then to consider whether the necessary right remains in them, having regard to the provisions of that Act.

It is, I think, important to bear in mind, in the first place, that the natural right of support, as known to the law, is a right of support for land in its natural condition. Lord Selborne L.C. in *Dalton* v. *Henry Angus & Co.* (1) said that the "doctrine laid down" (i.e., with regard to the natural right of support) "must, in my opinion, be understood of land without "reference to buildings." Viscount Maugham, in *London & North Eastern Ry. Co.* v. *B. A. Collieries, Ld.* said (2): "The common-"law right is to have support to the land in its natural state, "which is not an easement, but an incident to the land "itself." He then referred to Lord Selborne's speech in the case which I have cited (1). If there are buildings which do not contribute to the subsidence, damages to them can be recovered as part of the damage flowing from the defendant's wrongful act in causing the ground on which they stood to subside: *Stroyan* v. *Knowles* (3). If, therefore, as it seems to me, the corporation seek to rely on a natural right of support, they must establish a sufficient right in respect of the land on which their mains rest. A right of support for buildings or works can be acquired by grant, prescription, or statute. It is conceded that no claim based on prescription can be put forward in respect of these mains, and that there was no grant except such as can be implied by reason of the provisions of the Act under which the mains were laid.

As for the position apart from statute, the corporation rely on the fact that the mineral owners, the company's lessors, the Crown, in the right of the Duchy of Lancaster, had no right so to work their minerals as to let down or injure the surface land. No such right, therefore, could be conferred on the company. The owners, therefore, of the land in which these mains were laid have, and always had, the natural right of support as known to the law as against the mineowners. The corporation and their predecessors did not purchase any land or any interest in land from the owners of the land in which the mains are. Nothing in the nature of a proprietary interest in the land was vested in them. The mains were laid under successive local

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(1) 6 App. Cas. 740, 791, 792.

(2) [1945] A. C. 143, 159.

(3) 6 H. & N. 454, 465.

Acts, which embodied s. 6 of the Gas Works Clauses Act, 1847, which has already been set out. The first question, therefore, in my opinion, is: "What right would the corporation obtain "in relation to the land in which their mains were laid?" The rating cases which were cited to us lay down that undertakers with similar powers and duties to those possessed by the corporation have an exclusive right to occupy and enjoy a portion of the soil. The question is: "What portion?"

Lord Davey in *Holywell Union* v. *Halkyn &c. Drainage Co.* (1) said: "The law was thus stated by Wightman J. in *R.* v. *West* "*Middlesex Waterworks* (2). 'In this case,' says the judge, "'the first question is whether the company are rateable for "'their mains, which are laid under the surface of the highway, "'without any freehold or leasehold interest in the soil thereof "'being vested in the company. We think they are. These "'mains are fixed capital vested in land. The company is in "'possession of the mains buried in the soil, and so is de facto "'in possession of that space in the soil which the mains fill, "'for a purpose beneficial to itself'." In *R.* v. *Mersey & Irwell Navigation Co.* (3) Parke J. in referring to gas companies, said: "They have the exclusive right of occupying by means "of these pipes that portion of the soil in which the main is." Other statements could be cited. Mr. Harman, for the corporation, submits that they are, through their mains, also in occupation of the land on which the mains rest and of the other land surrounding them.

A question arose in the course of the argument whether the mains remain vested in the corporation as alleged in para. 1 of the statement of claim and admitted in para. 1 of the defence, or whether, as indicated in the passage cited from Lord Davey's speech (1) and in other cases dealing with rating, they become part and parcel of the freehold. Sir Cyril Radcliffe, for the company, was prepared to take the statement of claim as covering, as to both liability and damages, the claim as based on the latter view if it affected our decision. I was, at one time, inclined to think that it might, but I have come to the conclusion that this issue is immaterial. Whichever view is taken, the question remains, as it seems to me: "Do the corporation "occupy any land except that which their mains fill?"; and, in particular: "Do they occupy the land on which the "mains rest?" The cases cited, and there are others, suggest

(1) [1895] A. C. 117, 132.
(2) 1 E. & E. 716, 720.
(3) 9 B. & C. 95, 112.

the answer "No," and, although the matter may not have been of crucial importance in those cases, the principle seems fairly clearly laid down. There are, in any event, to my mind difficulties about Mr. Harman's submission. How far does the occupation go? Could the gas undertakers maintain an action of trespass if someone interfered with the soil within six inches or one inch of their main, or only if he disturbed the soil actually touching the surface of the main? I am assuming that no damage is done to the main. The reality of the matter, as it seems to me, is that what the undertaker, operating under s. 6, wants is not the occupation of some surrounding undefined area of soil but a right of support for his mains. Such a right, per se, cannot be claimed under the natural right of support unless the corporation can establish rights in respect of the ground on which they rest. If they could establish this latter right, it is conceded that the mains did not contribute to the subsidence and that this damage to their mains could be claimed as resulting from the letting down of the land on which they rest. On the authorities, and for the reasons which I have given, I do not think that they can establish any such right.

Neither the Gas Works Clauses Act, 1847, nor the Public Health Act, 1875, dealing with sewers, gave, in terms, any right of support for the gas mains or sewers laid under the provisions contained in them. The question came before the courts first in *In re Dudley Corporation* (1). In that case the owner of the land in which the sewer was laid had no right of support as against the mineowner, as the surface and the minerals were both in the ownership of the defendants. Mr. Harman's argument in the present appeal was not, therefore, possible. The decision proceeded on the basis that the purpose of the statute would be defeated if there were no right of support. Both Brett and Lindley L.JJ., speak of the right of support for a sewer, not for the land on which it rested. The consequent interference with the mineral owner's rights was, it was held, covered by the words of the statute providing for compensation. The court, therefore, held that Dudley Corporation had, under the provisions in the relevant statute, similar to those in s. 6 of the Gas Works Clauses Act, 1847, with which this appeal is concerned, an implied grant of a right of support for their sewers, coupled with a liability to compensate the mineral owners for the damage done to their property. This implied right differed, as it seems to me, in three respects from the

(1) 8 Q. B. D. 86.

natural right of support. It involved a liability to pay compensation, it was in respect of works and not of land, and it existed although the weight of the works themselves could contribute to the subsidence.

The case does not, of course, cover Mr. Harman's argument, but Sir Cyril Radcliffe relied on the general reasons, and on the fact that no reference is made to the land's having itself no right of support, as being more consistent with his argument than with Mr. Harman's. He reinforced this line of argument by reference to *Normanton Gas Co.* v. *Pope & Pearson, Ld.* (1), where a similar point came before the courts. The actual point decided there is immaterial to the present issue. Sir Cyril Radcliffe emphasized the fact that the gas mains in question there were laid below a highway which had a right of support as against the mineral owners, and this was clearly before the courts. It may well be that, as Mr. Harman submitted, the mains must have been in a stratum below the highway, and that this stratum, being in the ownership of the mineral owners, had no right of support for the same reason as existed in *In re Dudley Corporation* (2). It is, however, I think, of some importance that no one sought to distinguish the stratum, in which the pipes were, from the highway; nor was the fact that the highway had its right of support regarded as affecting the matter.

Mr. Harman also submitted that it is, in effect, impossible to apply the principle in *In re Dudley Corporation* (2) to a case like the present where the mineowner cannot let down the surface. Everything, he says, can be sensibly dealt with if the corporation enjoy the natural right of support enjoyed by the owners of the land in which the mains are. If you seek to apply the principle in *In re Dudley Corporation* (2), there is nothing, he submits, for which the mineral owner can claim compensation, as he is already bound to support all the land. All that has happened is that another person has appeared who has the same right as everyone else to be supported. The surface owners could sub-divide their property and make grants carrying with them the natural right of support. On the view which I have taken, the corporation here need the principle in *In re Dudley Corporation* (2) in order to claim damages if their mains are, in fact, let down, and there would be no necessary absurdity if they were able to show that their advent had caused no greater interference than that which the mineowner already had to bear. I am not, however, clear that the mineowner might not be able to show some damage. Although a mineowner may have no right to let down the surface, it may be in the general interest of the inhabitants of the area that the mines should be worked, although such working may involve some subsidence. It may be neither difficult nor onerous for him to arrange so that injunctions are not sought against him. The advent of an undertaker with works protected by the principle in *In re Dudley Corporation* (1) principle may introduce an obstacle to the working of the minds which, on evidence, might support a claim for compensation. Neither the decisions nor the reasoning in these cases are, in my view, conclusive of the present appeal, but, on the whole, they appear to me to fit in with the company's arguments better than with those of the corporation.

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(1) 52 L. J. (Q. B.) 629.

(2) 8 Q. B. D. 86.

My conclusions can be summed up in three propositions: (1.) The corporation occupy, and occupy only, the space in which the mains are; (2.) the only right which they can put forward is a right of support for their mains; (3.) the natural right of support possessed by the surface owners is a right of support to the land in its natural state, and the corporation cannot claim this right because their occupation is restricted to their mains. It follows, therefore, that, before 1883, and apart from the new protection afforded by the Act of that year, the corporation had no right of support except that which is implied, by reason of their powers and duties, under the principle in *In re Dudley Corporation* (1).

This brings me to the Act of 1883. That Act applied what is usually called the "mining code" of the Waterworks Clauses Act, 1847, with modifications, to, inter alia, local authorities carrying on gas undertakings. Counsel stated, I have no doubt correctly, that local authorities objected to that part of the principle in *In re Dudley Corporation* (1) which made compensation immediately payable when the works were constructed, irrespective of whether the mineowner was at the time about to work seams which would, or might, damage the local authorities' works. The "mining code," the general provisions of which are familiar, postpones the question of payment of compensation until the mineowner is about to work within forty yards, or some other prescribed distance, of the mains. The general scheme of the Act is clear: it provides a new mode of protection, a new system of compensation; and, subject to certain savings, takes away, by s. 4, the right implied under the

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(1) 8 Q. B. D. 86.

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relevant local-authority statute as laid down in *In re Dudley Corporation* (1). In order, however, to obtain the new protection, the local authority must make and deposit maps as laid down in ss. 19–21 of the Waterworks Clauses Act, 1847. The corporation in this case did not make and deposit maps, and, therefore, admittedly cannot claim the benefits of this part of the code. The relevant words of s. 4 have already been quoted. The corporation have to show that their works are entitled to protection otherwise "than by reason of anything "contained" in s. 6 of the Gas Works Clauses Act, 1847. The judge decided that they could show such a right. He based it on the view that they have, by force of statute, "the exclusive right to the possession of so much of the surface land "as is occupied by their pipes and on which the pipes rest." I think that the last words are crucial, and it is on this point that I come to a different conclusion from the judge, with most of whose judgment I entirely agree. I have already stated my reasons for holding that the corporation have not an exclusive right to possession of the surface land on which these pipes rest. This may seem, and perhaps is, a somewhat technical point, but the conclusion is, I think, in accordance with principle and authority. If it is said that this is a very fortunate result for the mineowner, it is, as I see it, due to the fact that the local authority did not choose to fulfil the conditions necessary for obtaining the protection which the Acts of Parliament entitled them to claim.

Sir Cyril Radcliffe took a further point, which was also developed by Mr. Clark: assuming that the judge was right and that the corporation were entitled to claim the right of support as it exists in this area by virtue of their occupation, nevertheless that also is a right which arises only by reason of s. 6, that being the sole instrument by virtue of which the corporation and the company are brought into relation with each other. Although it is not, on the view I take, necessary to decide this question, I myself doubt the validity of this submission. If, by virtue of their right of occupation under their Sanitary Act, the corporation were entitled to claim a right of support under what Mr. Harman described as the local law in this particular area, I should have thought myself that their right did not arise by reason only of s. 6 of the Act.

Before going on to the other points, I should perhaps say that, on the basis of the judge's conclusion as set out above, I agree

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(1) 8 Q. B. D. 86.

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with what he says about the corporation's right to sustain an action of nuisance.

On the first of the other points relating to pipes laid before 1883, I do not desire to add anything to what has been said by my brother Morton.

The second point on the cross-appeal may, I think, be formulated as follows: The mining code, as brought in by the Act of 1883, extends to mining forty yards on each side of the works in question. Section 4, therefore, ought to be construed as only taking away the right under *In re Dudley Corporation* (1) within the area protected by the new code. We were referred, by Mr. Harman, to cases such as *London & North Western Ry. Co.* v. *Howley Park Coal & Cannel Co.* (2), *Wath-upon-Dearne Urban District Council* v. *John Brown & Co., Ld.* (3) and *New Moss Colliery, Ld.* v. *Manchester Corporation* (4), as showing, broadly, that, outside the forty-yards limit as prescribed by the code, common-law rights continue to exist. These cases do not seem to me really to deal with the question which arises here, which turns on the construction of s. 4 of the Act of 1883. I appreciate the force, considered generally, of an argument that words in a statute taking away a right may be impliedly limited in their scope by the new right which, reading the Act as a whole, is intended to be substituted for what is taken away. I myself doubt whether, in the present case, the necessary basis for any such argument exists. Section 3, sub-s. 2, of the Act of 1883 modifies the Waterworks Clauses Act, 1847, by conferring, or, at any rate, intending to confer, a power on the local authority to protect itself beyond the distance of forty yards. It was said that this sub-section was unworkable in that it appeared to be based on the existence of a notice to be given under the Waterworks Clauses Act, 1847, for which that Act did not provide. Whether this is so or not, it seems to me clear that the legislature intended to give the local authority power to take whatever protection it thought it required beyond the forty-yard limit, and, if that is so, the basis on which Mr. Harman seeks to limit the general words of s. 4 disappears.

Apart, however, from this sub-section, I think that the argument would fail: I think that the natural construction of the Act is that the legislature, rightly or wrongly, regarded the new protection as fully adequate, and, therefore, by using the general words of s. 4, intended to take away, as against mine-owners, though not others, all the rights which could be based on the principle in *In re Dudley Corporation* (1). In the result, I agree that this appeal succeeds.

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(1) 8 Q. B. D. 86.

(2) [1913] A. C. 11.

(3) [1936] Ch. 172.

(4) [1908] A.C. 117.

Appeal allowed.

Solicitors: *Routh, Stacey, Hancock & Willis, for Ellis & Ellis & Boulton, Burslem; Sharpe, Pritchard & Co., for the Town Clerk, Newcastle-under-Lyme.*

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(1) 8 Q. B. D. 86.

In re PRIESTLEY'S CONTRACT.

ROMER J.
1947
Mar. 10;
April 1.

Vendor and purchaser—Contract to sell house vested in trustees for sale—Possession given before date of completion—Delay in appointment of new trustee—Vendor's claim for and purchaser's refusal to pay interest on balance—Incorporated Law Society's General Conditions of Sale, 1934 *edition, paras.* 6, 7.

By a contract made on January 23, 1946, a house was agreed to be sold to a purchaser for 1,800*l.*, subject to special conditions and the Law Society's General Conditions of Sale, 1934, but omitting from the contract cl. 6 (2.) (*d*) under which a purchaser authorized to take possession before completion was bound from the date of taking possession until the date of actual completion to pay interest on the balance of the purchase money. The vendors purported to contract as trustees for sale, but at the date of the contract the legal estate was vested in the first vendor and his wife. The wife having separated from her husband was not a party to the contract, and the second vendor was intended to be appointed as trustee in her place, but had not been so appointed at the date fixed for completion namely February 20, or until April 5, although the appointment was abstracted as having been made.

The purchaser was let into possession of the property some time before February 20, but the purchase could not be completed at that date. After the execution of the deed appointing the second vendor trustee, a completion statement was sent to the purchaser's solicitors in which the vendors claimed interest at 5 per cent. as from the date for completion. The purchaser refused to pay any interest, and the purchase was not completed. On a summons being taken out to determine whether the vendors were entitled to interest on the balance of the purchase money:—

Held (1.) that the appointment of a new trustee in place of the wife not having been executed until some time after the date fixed for completion the purchaser had no opportunity of examining it before that date, and therefore the vendors were in default in deducing title in accordance with the contract. But (2.) as the contract expressly provided by special condition 3, that if the purchase was not completed by the date fixed, the balance of the purchase money should carry interest at 5 per cent. until payment, and the delay in completion after April 5 was due to the purchaser's refusal to pay interest, he was not excused by general condition 7(3.) from such liability, but having been in receipt of rents and profits from the date of taking possession was liable to pay interest on the balance of the purchase-money, after deduction of the original deposit and a further deposit of 200*l.* as from the date of completion.

ADJOURNED SUMMONS.

The facts, as stated in the learned judge's reserved judgment were as follows.

By a contract, dated January 23, 1946, the purchaser, Dennis Arthur Pook, agreed to purchase from the vendors, Lawrence Vernon Priestley and Thomas Leslie Mallard, a dwelling-house, land and premises known as "Shottery," 8, The Highway, Orpington, Kent, for the sum of 1,800*l.* Clause 1 of the Special Conditions of Sale provided that the property was sold subject to the Law Society's Conditions of Sale, 1934 ed., so far as not varied by or inconsistent with the Special Conditions. Clause 3 fixed the date for completion for February 20, 1946, and the balance of the purchase money (credit being given for the deposit of 10 per cent. payable on the sale) was to be paid on that day and if not so paid would carry interest at 5 per cent. until payment. The condition then stated that the deposit had been paid to Messrs. Arthur Ray & Company, of Orpington, as stakeholders and provided for delivery of requisitions, replies and draft conveyance and that completion should take place at the offices of the Bingley Building Society or their solicitors. Clause 4 stated that the vendors were selling as trustees for sale holding on trust for sale. Clause 8 provided that vacant possession would be given on completion and that cl. 6 (2.) (*d*) of the General Conditions should be deemed to be omitted from the contract. By cls. 6 and 7 of the Law Society's Conditions of Sale (1934 ed.): "6. Where under the "contract or otherwise, a purchaser is authorized to take "possession of the property before the actual completion of a "purchase, then (save as otherwise agreed) the following "provisions shall apply: (1.) The taking of possession shall "not be deemed to be—(*a*) an acceptance by the purchaser "of the vendor's title, (*b*) a waiver of the right of the purchaser "to make requisitions or objections in respect of the title. "(2.) A purchaser who takes possession shall, from the date of

" taking possession, and until the time of actual completion, " or until the vendor resumes possession by reason of the " rescission of the contract—(*a*) keep the property in as good a " state of repair and condition as it was in at the time of " taking possession, (*b*) pay all rents, rates, taxes, costs of " insurance and of repairs, and other outgoings in respect of the " property, (*c*) be entitled to receive the rents and profits as if " the date fixed for completion had arrived, (*d*) pay interest on " the purchase money or the balance thereof at the rate specified " in the next following condition. (3.) If the sale is rescinded " the purchaser shall—(*a*) forthwith deliver up possession of the " property to the vendor, in as good a state of repair and " condition as aforesaid, (*b*) apply any insurance money received " by him in respect of the property, in making good any loss or " damage to the property, or otherwise account for the same " to the vendor. (4.) Provided that (subject to the requisite " apportionment being made of all rents, rates, taxes, costs of " insurance and of repairs, and other outgoings and without " prejudice, in case of the purchaser's default, to the rights of " the vendor under cond. 32) the vendor shall repay to a " purchaser whose contract is rescinded, his deposit money, " if any (including any purchase money previously paid), " but without interest thereon, and the purchaser shall return " forthwith all abstracts and papers in his possession belonging " to the vendor, and shall not make any claim on the vendor for " costs, compensation or otherwise. (7.) (1.) If from any " cause whatever (save as hereinafter mentioned) the completion " of the purchase is delayed beyond the date fixed for " completion, the purchase money, or where a deposit is paid, " the balance thereof, shall bear interest at the rate of £5 per " cent. per annum from the date fixed for completion to the " day of actual payment thereof. (2.) Provided that, if delay " in completion arises from any other cause than the purchaser's own act or default, the purchaser may (except " in a case to which cond. 6 applies)—(*a*) at his own " risk, deposit the purchase money, or where a deposit " is paid, the balance thereof, at any bank in England or Wales, " and (*b*) give notice, in writing, forthwith of such deposit, to " the vendor or his solicitors, and in that case the vendor " shall (unless and until further delay in completion shall arise " from the purchaser's own act or default) be bound to accept " the interest, if any, allowed thereon, as from the date of such " deposit, in lieu of the interest accruing after the date of the "deposit, which would otherwise be payable to him under this "condition. (3.) No interest shall become payable by a "purchaser if and so long as delay in completion is attributable "to—(*a*) default by the vendor in deducing title in accordance "with the contract, or in giving an authority to inspect the "register kept under the Land Registration Act, 1925, or in "conveying; or (*b*) any other act or default of the vendor or his "Settled Land Act trustees. (4.) The vendor shall, as from "the date when interest becomes payable under para. (1.) of "this condition, have the option (to be exercised in writing at "any time before actual completion and before a deposit of "the purchase money or the balance thereof under para. (2.) "shall have been made) of taking the rents and profits or an "apportioned part thereof (as the case requires) less the "outgoings or an apportioned part thereof, up to the date of "actual completion, in lieu of the interest otherwise payable "under the said para. (1.); and, if the said option is exercised, "the same payments, allowances and apportionments shall be "made as if the date fixed for completion had been the date of "actual completion."

The completion of the contract was delayed beyond February 20, 1946, and I propose to consider first whether the purchaser is right in his contention that such delay was, in the words of cl. 7 (3.) of the General Conditions, "attributable to "default by the vendors in deducing title in accordance with "the contract." If the purchaser is right on this point the further question will arise whether, having regard to the contract as a whole, he is exempted from payment of interest by cl. 7 (3.) notwithstanding that he was allowed to enter into and remain in possession.

On January 9, 1946, Mr. Priestley sent to the purchaser's solicitors (Messrs. A. C. Warwick & Co.) the contract, which he had signed, and also enclosed an abstract of title. Messrs. Warwick amended the contract in one respect and returned it to Mr. Priestley on January 22 with the request that he would let them have the rest of the abstract in exchange for the purchaser's part of the contract as the purchaser desired to complete as early as possible. On January 24 Mr. Priestley forwarded a supplemental abstract of title. The original and supplemental abstracts of title were not exhibited but they showed that at the date of the contract the property agreed to be sold was vested in Mr. Priestley and his wife Mrs. Olive Priestley to whom the property had been conveyed on trust for sale; and that they had mortgaged the property to the Bingley Building Society. It also appears from a letter from Messrs. Warwick to Mr. Priestley on February 14 that the abstract of title purported to abstract a deed of appointment, stamped, duly executed and attested and dated as of January, 1946, whereby Mr. Thomas Leslie Mallard was appointed a trustee for sale in the place of Mrs. Olive Priestley. A letter of February 22 to Mr. Priestley from a firm of solicitors in Birmingham, however, says that the appointment had not the word "January" inserted. On January 29 Messrs. Warwick sent in their requisitions on title and in answer to requisition number 16 were informed by Mr. Priestley, who was acting as solicitor to the vendors, that "the conveyance to the vendors, "the mortgage by them and the Deed of Appointment" would be handed over to the purchaser on completion. On February 1 Messrs. Warwick wrote to Mr. Priestley asking (inter alia) what was the date of the deed of appointment of new trustees and whether it had been executed by all three parties; and they asked to be supplied with a copy of executions and attestations. On February 3 Messrs. Warwick enclosed draft conveyance subject to outstanding requisitions. In answer to Messrs. Warwick's queries in their letter of February 1 Mr. Priestley wrote on February 5, saying, "The deed of "appointment is not dated but is intended to be dated the same "date as the vacating receipt on the mortgage to the Bingley "Building Society. The deed has been executed by Olive "Priestley in the presence of a clerk with Messrs. A. V. "Hammond & Company, solicitors, Bradford, and will be "executed by me on completion. The deed is held by Messrs. "Mogford, Son & Warwick, solicitors, Birmingham, at whose "office it is intended completion shall take place as they are "solicitors for the Bingley Building Society at Birmingham." In response to this information Messrs. Warwick replied on February 5, "In view of your further reply the Conveyance "must be by yourself and Olive Priestley. Mr. Mallard should "not have been a party to the contract. Please return our "draft conveyance so that it can be amended." Mr. Priestley answered on February 6 that the conveyance was to be made by himself and Mr. Mallard, who were the newly appointed trustees for that purpose. On the following day Messrs. Warwick wrote, "The legal estate is still vested in yourself "and Olive Priestley, by whom the conveyance must be made, "as the proposed appointment is not complete. Mr. Mallard "has no interest in the property whatsoever. There appears "to be no object in making an appointment of new trustees "of the property immediately before the conveyance of the "property concerned." To this Mr. Priestley answered on February 13 that Mrs. Priestley would not be a party to the conveyance and that the appointment would be completed before the sale to the purchaser. Messrs. Warwick persisted in their objection by letter, dated February 14, and on the 19th Mr. Priestley again stated that the appointment would be completed immediately before completion and the Bingley Building Society mortgage discharged so that, on the date of the completion, the vendors would be in a position to convey the property contracted to be sold free from incumbrances. He asked Messrs. Warwick whether, if the appointment was forthwith completed and stamped, they would then raise any objection, and if so, what. On February 20 (the date fixed for completion by the contract) Messrs. Warwick pointed out that no explanation had been given why it was necessary to appoint new trustees solely for the purpose of the conveyance to their client. "In fact," they added, "no appointment has been "made and the existing trustees are the only persons competent "to convey, and they will be shown as discharging the "mortgage." Nothing much further seems then to have happened for more than a month and then, in answer to a letter from Mr. Priestley of March 27, Messrs. Warwick wrote on March 28 that on a certain basis which is not for present purpose relevant and "provided the deed of appointment of new "trustees is completed and executed by all three parties and "duly stamped, and we are supplied with a full abstract of this "deed, together with the address of Mr. Mallard, we will then "be in a position to prepare the conveyance in this matter." On April 1 Mr. Priestley wrote to say that the deed of appointment of new trustees would be completed and stamped before completion of the sale and would, in fact, probably be done in about a week's time, and on April 17 he wrote further informing Messrs. Warwick that the appointment of Mr. Mallard as trustee was completed and had been dated April 5, 1946. On May 2, Messrs. Warwick wrote to Mr. Priestley that they had received abstract of deed of appointment, duly examined, from their agents and subject to outstanding requisitions they enclosed conveyance for execution by the vendors. Then came the completion statement in which the vendors claimed interest from February 20, and, as a result of such claim, which has led to the present summons, it only remains to say that the sale has never been completed.

The summons was taken out by the vendors asking for a declaration that under the contract they were entitled to interest on 1,620*l*. balance of the purchase money, at the rate of 5 per cent. per annum from the date fixed for completion, viz.: February 20, to the day of actual completion. The purchaser contended that, the delay in completion was wholly attributable to the default of the vendor, and therefore that he was under no liability to pay interest.

G. D. Johnston for the vendor. The vendor has shown a perfectly good title and has been ready to complete since April 5, 1946. The purchaser has taken possession, but refuses to pay interest since the date of completion. The clause in the General Conditions requiring the purchaser to pay interest from the date of taking possession was struck out, but that only relieves him from such liability before the date of completion. Apart from any special agreement a purchaser taking possession is bound to pay interest as from that date until actual completion. *Fludyer* v. *Cocker* (1); *Attorney-General* v. *Dean of Christchurch, Oxford* (2); *Birch* v. *Joy* (3). A vendor is not required to discharge a mortgage on the property until the actual date of completion, though he cannot until then sell free from incumbrances.

Charles Russell for the purchaser. The vendor is in default. He claims to be entitled to delay completion indefinitely, and at the same time to get 5 per cent. interest on his money. There is no reason for saying that cl. 7 (3.) of the General Conditions is not applicable to a case of possession by the purchaser. For cl. 7 (2.) expressly excludes cl. 6, which indicates that cl. 7 does apply to cases under cl. 6 except where expressly excluded. The applicant has not shown a good title according to the abstract, and it was his duty to do so in good time before completion, to enable the purchaser to examine the deeds against the abstract. The purchaser has never seen a proper abstract, for the appointment of Mr. Mallard as trustee had not been executed at the date of completion. The appointment abstracted should be what it purports to be—a document in existence at the time. The vendor is bound to show that he has got the legal estate. He is in default, but not

(1) (1805) 12 Ves. 25.
(2) (1842) 13 Sim. 214.
(3) (1848) 3 H. L. C. 565.

wilful default. He has had plenty of time to do what he ought to have done. There is no analogy between the present case and that of a mortgage receipt.

Johnston replied.

Cur. adv. vult.

Apr. 1. ROMER J. read a judgment in which, after stating the facts, he proceeded: It is upon the above facts that the question arises whether the delay from and after February 20, 1946, in completing the contract was "attributable to default by the "vendors in deducing title in accordance with the contract." Mr. Johnston on behalf of the vendors argued that it was not. He said that the vendors' obligation was to show title at or before completion of the sale and, provided they did so, they could not be said to be in default. He said that the vendors had abstracted a deed of appointment of new trustees which had already been executed by Mr. Priestley's wife, and which would be executed by Mr. Priestley also, and thus perfected, at completion of the sale. Execution by Mr. Mallard was not required to give the deed validity and in any case he would be bound to execute it in that he was a party to the contract for sale. Mr. Johnston compared the position with that of a sale by a mortgagor free from incumbrances who has to obtain the concurrence of the mortgagee and sufficiently discharges his obligation by obtaining such concurrence at completion. I think these contentions fail to pay due regard to the requirements of the position. As stated in Williams on Vendor and Purchaser (4th ed., p. 204), a vendor is under an obligation, both to show title upon the face of the abstract which he delivers and to prove his title by production of the proper evidence, and both these obligations ought properly to be performed by the vendor well before the day fixed for completion. In the present case the deed of appointment passing the legal estate from Mr. and Mrs. Priestley to Mr. Priestley and Mr. Mallard was obviously of vital importance in this matter and until it was signed, sealed and delivered both by Mr. Priestley and by Mrs. Priestley it is clear that Mr. Mallard had no interest in the property whatsoever. The only relevant document which existed down to the date fixed for completion, and, indeed, down to some date in April, 1946, was an undated and unstamped parchment, purporting indeed to have been executed by Mrs. Priestley and in the custody apparently of the mortgagees, but otherwise having no legal effect at all.

Accordingly at no material time did a document conferring title on the vendors exist, and it follows that no such document was, or could be, abstracted prior to February 20. It is no answer, in my judgment, to say that if the purchaser had attended completion all would have been well. It might or might not have been, so far as stamping of the document and its execution by Mr. Priestley were concerned, but the purchaser would have had no previous abstract of the document or opportunity for inspection and consideration. The concurrence of a mortgagee who is immediately redeemable is simply a matter of conveyancing and is not comparable to the due execution of a deed, such as the deed of appointment, which constitutes the very title of one of the vendors and without which he had no interest in the property at all. I am accordingly of opinion that the vendors were in default on and after February 20, 1946, in deducing title in accordance with the contract and that this question therefore must be answered in favour of the purchaser.

As preliminary to the second point which falls to be considered it will be convenient to refer to the circumstances in which the purchaser was let into possession of the property sold and sub-cl. 2 (*d*) of cl. 6 of the General Conditions of Sale was agreed to be omitted from the contract. By para. 5 of his affidavit sworn in support of this application Mr. Priestley states as follows : " Concurrently with the said contract it was " agreed that the purchaser should be entitled to possession " of the said property before the actual date of completion on " the conditions following, namely :—(*a*) that the sum of 200*l.* " should be deposited in the bank in the joint names of myself " and the purchaser's solicitors, Messrs. A. C. Warwick & Co. " (*b*) Purchaser undertaking to complete within one month after " taking possession and that time in this respect should be of " the essence of the contract. (*c*) That certain furniture " belonging to me should be allowed to remain until completion. " (*d*) That no interest should be payable on the purchase money " in respect of such possession before completion, i.e., for the " period prior to date fixed for completion by the contract, " but it was verbally agreed that the purchaser would pay " interest for his occupancy of the premises if the sale was not " completed on the appointed day." Mr. Pook, by his affidavit, denies that it was ever agreed that he should pay interest if the sale was not completed before the date fixed for completion and accordingly Mr. Johnston, on behalf of the vendors, did not

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rely on the oral agreement to this effect deposed to by Mr. Priestley. The correspondence discloses that the purchaser was proposing to buy some small articles of property in the house which belonged to Mr. Priestley and that certain furniture should remain there for the time being. The purchaser who had paid a deposit on the property as early as December 14, 1945, was anxious to go into possession as soon as possible. Mr. Priestley wrote on January 10 saying that if it would suit Mr. Pook's convenience he could probably arrange for him to take possession by the end of January and if they had not been able to complete by then he (Mr. Pook) could deposit the balance of the purchase money in the joint names of Messrs. Warwick and Mr. Priestley pending completion. On January 14 Messrs. Warwick replied that the financial arrangements which the purchaser had made to cover the purchase would not allow him to deposit the balance of the purchase money except in exchange for the deeds. In those circumstances they suggested that he be allowed to take possession as a tenant at will, he being responsible for the outgoings from the time he should take possession until completion. On January 15 Mr. Priestley wrote, " If your client is having a mortgage on the " house I would agree to his taking possession upon his paying " into the joint names of yourself and myself the balance of " cash that he will be finding and signing the proposed mortgage " to enable you to complete, it being stated that he takes " possession undertaking to complete the matter within one " month thereafter and that time is of the essence of the con- " tract in this respect." Apparently Mr. Priestley and Mr. Pook had a meeting on January 21, and on the following day Messrs. Warwick wrote to Mr. Priestley confirming (inter alia) that " it was agreed that on our client going into " possession before completion no interest would be payable " on the purchase money as provided by the conditions. " Accordingly we have made provision for the deletion from the " contract of cl. 6 (2.) (*d*) which relates to this. . . . As " arranged we have placed on deposit the sum of 200*l.* in the " joint names of yourself and ourselves at Lloyds Bank, Ld., " Sydenham." Mr. Priestley replied on January 23 approving Messrs. Warwick's amendment of the contract and saying that he was giving instructions for the key of the house to be handed to Mr. Pook at any time. It was on the arrangements as outlined above that the purchaser shortly afterwards entered into possession of the property. So far as Mr. Pook's liability to pay interest on the purchase money is concerned such liability is dependent, in my judgment, on the terms of the written contract between the parties which may be read in the light of, but are not (except so far as concerns the further 200*l.* deposit) for present purposes affected by, the arrangements made between them.

On the question of general principle Mr. Johnston referred me to certain authorities in support of the proposition that prima facie a purchaser in possession is bound to pay interest on any unpaid balance of purchase money. The cases to which he referred were *Fludyer* v. *Cocker* (1), *Attorney-General* v. *Dean and Chapter of Christchurch, Oxford* (2), and *Birch* v. *Joy* (3). In the first of these cases Sir W. Grant M.R., said with regard to a purchaser who takes possession without a conveyance: "The purchaser might have said he would not "have anything to do with the estate until he got a conveyance. "But that is not the course he took. He enters into possession, "an act that generally amounts to a waiver even of objections "to title. He proceeds upon the supposition that the contract "will be executed; and therefore agrees that from that day "he will treat it as if it was executed. The act of taking "possession is an implied agreement to pay interest; for so "absurd an agreement as that the purchaser is to receive the "rents and profits, to which he has no legal title, and the vendor "is not to have interest, as he has no legal title to the money, "can never be implied." In *Attorney-General* v. *Dean and Chapter of Christchurch, Oxford* (2), Sir Lancelot Shadwell V.C., directed a purchaser in possession to pay interest on the purchase money "according," as he said, "to the common course "of the court." In *Birch* v. *Joy* (4) the Lord Chancellor (Lord St. Leonards) said: "There is nothing on the face of this "contract to give to the purchaser all the rents of the estate "from a given day, and to absolve him from the payment of "interest on the purchase money and, therefore, if the purchaser "is to find a stipulation of that sort in his favour, he must find "it somewhere else; it is not in this contract. This contract, "if it had been executed by a Court of Equity, would have "been executed according to equity and good conscience, and "according to the rules of the court, upon which there cannot "be a doubt, nor has there been any difference at the Bar. "From the time at which the purchaser was to take possession

(1) 12 Ves. 25.

(2) 13 Sim. 214.

(3) 3 H. L. C. 565.

(4) Ibid. 590.

"of the estate he would be deemed its owner, and he would be "entitled as owner to the rents of the estate, and would have "kept them without account. From the same period the "seller would have been deemed owner of the purchase money, "and that purchase money not being paid by the man who was "receiving the rents, would have carried interest, and that "interest would have belonged to the seller as part of his "property. A Court of Equity, as a general rule, considers "this to follow. The parties change characters; the property "remains at law just where it was, the purchaser has the "money in his pocket, and the seller still has the estate vested "in him; but they exchange characters in a Court of Equity, "the seller becomes the owner of the money, and the purchaser "becomes the owner of the estate. That is the settled rule of a "Court of Equity; and in applying that rule to this contract, "the court would not have had the slightest difficulty." Mr. Johnston contended that these principles apply to the present case subject only to this, that having regard to the deletion, by express agreement, of cl. 6 (2.) (*d*) of the general conditions, the purchaser was freed from payment of interest from the time he took possession until the date fixed for completion, but that this freedom ceased on that date. He contended, as a different way of putting the matter, that in any case the contract should, if ambiguous, be construed in the light of these general equitable principles. Mr. Russell, for the purchaser, contended, on the other hand, that this was not an application for relief under the general jurisdiction but was a claim to 5 per cent. interest under the contract itself, and that, in any event, the parties made a bargain for themselves and that accordingly there is no room for the application of any general principles.

My view of the matter is that I must look to the contract itself for the elucidation of the problem but that if an ambiguity arises out of it then the prima facie liability of a purchaser in possession to pay interest should be borne in mind. I approach, therefore, the construction of the contract. By cl. 3 of the special conditions the purchaser agreed to pay interest at 5 per cent. on the balance of the purchase money (credit being given for the deposit of 10 per cent. payable on sale) from the date fixed for completion until payment. Condition 6 of the general conditions (as amended by agreement between the parties) imposed on Mr. Pook, as a purchaser taking possession before completion, the obligation, as from the date of taking possession, to keep the property in repair and to pay rents and other outgoings until the time of actual completion; the condition also conferred on him, during the same period, the right to receive the rents and profits. The deletion of sub-cl. 6 (2.) (*d*) freed the purchaser from payment of interest on unpaid purchase money from the date of taking possession but did not override his liability, imposed by special condition 3, to pay such interest at 5 per cent. from and after the date fixed for completion. Such then being the purchaser's rights and liabilities, the question next is how and to what extent they are modified by general cond. 7. Sub-clause (1.) of cond. 7 is clearly directed to purchasers who do not take possession before completion, for the question of interest payable by purchasers who do take possession has already been dealt with by cond. 6 (2.). By cond. 7 (2.) purchasers who do not take possession, but not (by reason of the exception contained in the sub-lease) purchasers who do take possession, are entitled to deposit the purchase money in a bank if completion is delayed through no default of their own, and in such case the vendor has to be content with the interest earned by the money deposited; a purchaser in possession, however, has in like circumstances to continue to pay interest on the unpaid balance of purchase money at 5 per cent. per annum. Sub-clause (3.) deals with the position where not only is the purchaser not responsible himself for the delay in completion but such delay is attributable to certain specified defaults of the vendor, and in such cases the sub-clause exempts the purchaser from payment of interest. The question is whether this exemption operates in favour of Mr. Pook, who agreed by special cond. 3 to pay interest after the date fixed for completion, and who was entitled both before and after that date to the receipt of the rents and profits by virtue of general cond. 6 (2.) (*c*). It was argued that as the exception in cond. 7 (2.) does not appear in cond. 7 (3.) the inference, as a matter of construction, is that the latter sub-clause includes purchasers who take possession as well as purchasers who do not. I think this argument attributes more weight to the exception in sub-cl. (2.) than it can properly bear. Sub-clause (2.) is merely a proviso to sub-cl. (1.) and I have already pointed out that sub-cl. (1.) is directed to the case of purchasers who do not take possession as distinct from the case of purchasers who do. I think the exception to sub-cl. (2.) was inserted ex abundanti cautela having regard to the apparent generality of the language used in sub-cl. (1.). In my judgment, just as sub-cl. (2.) is a proviso to, and in reality a part of, sub-cl. (1.), so also is sub-cl. (3.) referable to sub-cl. (1.) and the words "no interest shall become payable by a "purchaser" mean "no interest payable under sub-cl. (1.) "shall become payable by a purchaser," namely, by a purchaser not in possession. This view of the matter is, I think, confirmed by sub-cl. (4.) the provisions of which only appear to be applicable to cases where the purchaser has not entered into possession.

I am accordingly of opinion that as Mr. Pook was and is a purchaser in possession he is not entitled to rely on general cond. 7 (3.) as freeing him from the liability which he accepted under special cond. 3. I am not sorry to arrive at this conclusion because it accords with the principles which have been accepted as fair and equitable in the decisions to which I have referred. These principles were departed from to the extent of exempting the purchaser from payment of interest from the date of taking possession to the date fixed for completion and the reason was that the purchaser made a 200*l*. deposit in the names of agreed stakeholders. I should, however, require much clearer language than any that is to be found in the contract before me to justify the view that the parties to a sale intended to oust these principles of equity altogether. Nor is such justification to be found in the letters to which I have referred and which disclose the general arrangements under which possession of the property was given.

I observe that in the completion statement the vendors sought to charge 5 per cent. interest on the whole of the purchase money except the original 10 per cent. deposit of 178*l*. This is wrong as they are clearly not entitled to interest at that rate on the further deposit of 200*l*. to which I have referred. Subject to that modification, I will make a declaration in accordance with question 1 of the originating summons.

Solicitors: *Cliftons; A. C. Warwick & Co.*

H. L. L.

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Mar. 25, 26 27; *April* 25.
Lord Greene M.R., Cohen and Asquith L.JJ.

Medicine—Regulation of retail sales—"Substance recommended as a "medicine"—Prohibition of sale by retail except by authorized persons—Description on label or wrapper—Pharmacy and Medicines Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 42), *ss.* 11, 12, 17.

The Pharmacy and Medicines Act, 1941, s. 12, prohibits the sale by retail of any article "consisting of or comprising a substance "recommended as a medicine" except by certain authorized persons. Section 17 defines the words "substance recommended "as a medicine" in relation to the sale of an article consisting of or comprising a substance so recommended as a substance referred to on the article or any wrapper or container in which it was sold or any label attached thereto "in terms which are calculated to lead "to the use of the substance for the prevention or treatment of any "ailment, infirmity or injury affecting the human body":—

Held, that articles sold under the respective descriptions on the wrappers or containers of "fluid extract of cascara sagrada," "compound rhubarb pills" and "extra strong effervescing "powders, a war-time substitute for seidlitz powders," accompanied only with the names of the makers or vendors and directions as to doses, were not sold as substances recommended as medicines. The fact that it was common knowledge that the first and second of these were remedies for constipation and that seidlitz powders were mild remedies for constipation could not be taken into account in considering whether the substances in question were referred to in terms calculated to lead to their use "for the "prevention or treatment of any ailment, infirmity or injury "affecting the human body."

Decision of Wynn-Parry J. (ante p. 137) reversed.

APPEAL from Wynn-Parry J. (1).

The plaintiffs, who were wholesale druggists, took out a summons against the defendant society, as the body entrusted with the duty of enforcing the provisions of the Pharmacy and Medicines Act, 1941. The object of the proceedings which were of a friendly character was to obtain the court's decision on the proper construction and effect of certain sections of the Act and particularly the meaning of the words "substance "recommended as a medicine" in ss. 11 and 12 as defined in s. 17 (2). The summons asked two questions but the only material question on this appeal was whether certain articles when sold in a particular manner were substances recommended as medicines. These articles were sold in wrappers or containers

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(1) Ante p. 137.

(2) Pharmacy and Medicines Act, 1941, provides: s. 11: "Subject to the provisions of this "Act no person shall—(*a*) sell by "retail any article consisting of or "comprising a substance recommended as a medicine; or "(*b*) supply any such article as a "sample for the purpose of in-

"ducing persons to buy by retail "the substance of which it consists or which it comprises; "unless there is written so as to be "clearly legible on the article or a "label affixed thereto, or, if the "article is sold or supplied as "aforesaid in a container, on the "container or a label affixed "thereto or, if the article is sold or "supplied as aforesaid in more "than one container, on the "inner container or a label affixed "thereto—(i.) the appropriate "designation of the substance "as recommended, or of each of "the active constituents thereof, "or of each of the ingredients of "which it has been compounded; "and (ii.) in a case where the "appropriate designation of each "of the active constituents or the "ingredients is written as aforesaid, the appropriate quantitative particulars of the constituents or ingredients."

Section 12: "(i.) Subject to the "provisions of this Act, no person "shall sell by retail any article "consisting of or comprising a "substance recommended as a "medicine unless he is—(*a*) a "registered medical practitioner "or a registered dentist; or "(*b*) an authorized seller of "poisons; or (*c*) a person not being "a registered medical practitioner "or a registered dentist or any "authorized seller of poisons, but "being a person who—(i.) has "served a regular apprenticeship "to a registered pharmacist or to "a body corporate authorized to "sell poisons by virtue of s. 9 "of the principal Act; and '(ii.) is at the date of the passing "of this Act carrying on on his "own account a business which "comprises the retail sale of "drugs."

Sub-section 3 provides what are the fines or punishment for a breach of the preceding provisions of the section.

Section 17: "(1.) In this Act "the following expressions have "the meaning hereby respectively "assigned to them— . . . . "'substance recommended as a "'medicine' in relation to the "sale of an article consisting of or "comprising a substance so recommended, means a substance "which is referred to—(*a*) on the "article, or on any wrapper or "container in which the article "is sold, or any label affixed to, "or in any document enclosed in, "the article or such a wrapper or "container; or (*b*) in any placard "or other document exhibited "at the place where the article is "sold; or (*c*) in any advertisement published after the passing "of this Act, by or on behalf of the "manufacturer of the article, or "the person carrying on the "business in the course of which "the article was sold, or, in a "case where the article was sold "under a proprietary designation, "the proprietor of the designation; "in terms which are calculated to "lead to the use of the substance "for the prevention or treatment "of any ailment, infirmity or "injury affecting the human body, "not being terms which give a "definite indication that the substance is intended to be used as, "or as part of, a food or drink, "and not as, or as part of, a "medicine."

labelled with the names of the makers or vendors and with the following particulars: (1.) Senna pods; (2.) Fluid extract of cascara sagrada, British Pharmacopœia, Dose: Half to one teaspoonful in half a wine glass of water; (3.) Lemon and squill linctus; (4.) Compound rhubarb pills, Dose: One or two at bed time; (5.) Extra strong effervescing powders, a war-time substitute for seidlitz powders. Dissolve the contents of the blue paper in half a tumbler of water, and then add the powder in the white paper and drink while effervescing. Take first thing in the morning on an empty stomach.

Wynn-Parry J. held that senna pods as sold was not a substance recommended for use as a medicine but held that the other four articles as sold were all substances recommended for use as medicines.

The plaintiffs appealed but not as to lemon and squill linctus and there was no cross-appeal as to senna pods.

Glyn-Jones K.C. and *G. G. Honeyman* and *R. P. Colinvaux* for the plaintiffs. Until the passing of the Pharmacy and Medicines Act, 1941, it was possible for grocers to sell medicines in their simple form or as proprietary medicines. The society contend that this right has been taken away. The labelled medicines have been selected to raise the issue as representing certain classes of medicines and the question is whether they are as sold "substances recommended as medicines." Before this Act the main statute affecting the sale of drugs was the Medicines Stamp Act, 1812, which imposed a duty on proprietary medicines and substances recommended as beneficial for the cure or relief of any ailment affecting the human body. The general effect was that any one could sell medicines after stamping them subject to the exceptions in the schedule under which there arose a division between qualified and unqualified vendors. That division was enlarged by the decision in *Farmer* v. *Glyn-Jones* (1), that, provided ingredients of medicines were disclosed so as to show that they were known and approved medicines, the medicines could be sold by chemists without putting on a stamp. As the stamp duty rose to 3*d.* in the shilling that in effect conferred a monopoly on chemists. The Act of 1941 abolished all stamps on medicines but maintained the existing trade division. The question is whether ss. 11 and 12 of the Act have gone still further by the provisions as to "a substance recommended as a medicine" which by

(1) [1903] 2 K. B. 6.

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s. 17 means a substance recommended as a medicine "in terms "which are calculated to lead to the use of the substance for the "prevention or treatment of any ailment, infirmity or injury "affecting the human body." The question then is whether in the three particular cases to which this appeal relates, they are by the labels "recommended as a medicine." The distinction sought to be drawn is between these medicines and those which are sold with a statement on them such as "this is good "for headaches." In none of the cases here is any ailment stated for which the substance sold is beneficial. That was recognized by Wynn-Parry J. as regards senna pods. Can it be said that the other three substances are recommended as medicines for any particular ailment? It is admitted that there is sufficient information to show that they are medicines and, if so, it is in the public interest that the proper dose should be indicated. The other side rely on the public knowledge but that is not a ground for saying that the medicines are "recommended" for any particular ailment. The reference to the British Pharmacopœia has been relied on but it only shows that the medicines are up to the proper standard. That book nowhere says what the articles are good for. The object of the Act is to preserve the distribution between grocers and chemists that previously existed and not to confer a monopoly on chemists. [They referred to *Nairne* v. *Stephen Smith & Co.* (1).] Thus s. 11, sub-s. 1, corresponds to something in the schedule to the Act of 1812 and so does s. 12, sub-s. 5, while s. 12, sub-s. 4, repeats what is in an earlier Act. So too s. 11, sub-s. 1, and s. 12, sub-s. 1, correspond to what is in the Schedule as construed in *Farmer* v. *Glyn-Jones* (2). All this goes to show that the Act of 1941, while putting an end to stamp duty on drugs, was intended to preserve the existing position and not to create a wider monopoly.

Blanco White K.C. and *J. Comyn* for the defendants. In the view of the society, the real struggle with the plaintiffs is not whether the village grocer can sell simple remedies, but whether their composition must be mentioned under s. 11, or whether that can be evaded. Suppose there were a label of some imaginary remedy such as St. Hubert's Oil marked for External Use Only—Rub in gently—those words would surely lead to its use for human ailments such as bruises, rheumatism and so forth. The label must be interpreted in all the circumstances. including the mode of publication. It will make all the difference if there has been a country-wide publication by advertisement. One must ask oneself what is the likely result of the terms on the label. If the likely result is that it will be used for some ailment, then it is within the section.

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(1) [1943] K. B. 17.

(2) [1903] 2 K. B. 6.

[Lord Greene M.R. But surely the purchaser would require some indication what it was good for. If a man was suffering from rheumatism, he would want to know before buying St. Hubert's Oil whether it was intended for the treatment of rheumatism or only for some other ailment such as bruises.]

The test under this Act is quite different from that under the Act of 1812. There the test was: "Is this held out as beneficial." The test under the new Act is wider and is based on consequences.

[Lord Greene M.R. The Act of 1941 creates a criminal offence. Is the village grocer to be taken as knowing the extent and results of an advertising campaign ?]

It is a mistake to regard the Act of 1941 as merely amending the earlier statute. Sections 1 to 7 are concerned with amendments but ss. 8 to 12 with the protection of the public. Section 12 in particular protects the public by limiting sales of drugs to sales by qualified persons. That limitation had previously been imposed in regard to poisons and this Act carried it a stage further. Turning to the particular labels in question here. A drug labelled "liquid extract of cascara "sagrada" with the proper dose would be known by a large body of the people to be good for constipation.

[Lord Greene M.R. If the policy of the Act is to stop unqualified persons from selling drugs, why does it not say so ?]

Section 12 is beneficial and prevents secret drugs being sold. The 1941 Act cannot be construed in the light of the 1812 Act as the plaintiffs seek to do. It must be separately construed.

Glyn-Jones K.C. replied.

Cur. adv. vult.

Apr. 25. Asquith L.J. read the judgment of the court. This is an appeal by the plaintiffs from a judgment of Wynn-Parry J. on an originating summons raising for the determination of the court certain questions relating to the construction of ss. 11, 12 and 17 of the Pharmacy and Medicines Act, 1941. The litigation is friendly litigation; the issues are difficult; and the result important. This is a test case. It affects vitally the respective rights, in relation to the sale of medicines, of qualified dealers (for example, chemists) and unqualified dealers (for example, grocers), and also the extent of the obligation resting on both, to disclose the composition of medicines sold.

[His Lordship read ss. 11, 12 and 17 of the Act, so far as relevant, and stated the effect of the summons and judgment :]

The decision in this case proceeded on agreed facts contained in an affidavit by Richard Charles Wren, the material passages in which are set out in the judgment of the learned trial judge and will be referred to when necessary in this judgment. The two rival constructions of " substances recommended as a medicine" are as follows : in the definition it will be remembered that such a substance means a substance which is " referred to " (in writing : The various forms of writing are set out in (*a*), (*b*) and (*c*) above) " in terms which are calculated to lead to the " use of the substance for the prevention or treatment of any " ailment, infirmity, or injury affecting the human body " . . . ." The plaintiffs argue that the written terms must specify the particular ailment or group of ailments for the prevention or treatment of which the substance is appropriate, and that if the written terms are silent as to such ailment or ailments, the substance is not a " substance recommended as a " medicine " within the definition. The defendants for their part argue that the definition is complied with, though the label mentions no specific ailment or ailments, provided it is common knowledge that the substance in question is in fact used for the prevention or treatment of a specific ailment or group of ailments. In the case of a consuming public armed with that knowledge, for example, with the knowledge that fluid extract of cascara sagrada is a remedy for constipation, the written terms, though they do not mention constipation but are simply the correct name of the preparation offered, may nevertheless be " calculated " (so the argument runs) " to lead to the " use of " fluid extract of cascara sagrada for the prevention or the treatment of constipation. The learned judge has accepted this contention as regards the three substances under appeal.

It should be mentioned that in respect of each of those three substances the effect of the agreed evidence is that the public knows that the substance is or is supposed to be a remedy for a specific ailment, namely constipation. The affidavit states, for example, in the case of cascara sagrada " It is a popular " mild laxative . . . . when purchased by retail customers " cascara is purchased for human use as a laxative " ; in the case of compound rhubarb pills " a well-known household "remedy as a vegetable laxative"; in the case of the effervescing powders—war-time substitute for seidlitz powders—"seidlitz powder is a well-known mild purgative."

In these circumstances it may be convenient to inquire first what meaning a court should attach to the words of the definition, if it limits its purview to the four corners of the definition itself. If that meaning is wholly clear, no other question arises. But if or in case that meaning is open to doubt or ambiguity, it will be convenient secondly to consider whether any clear policy can be discerned underlying the Act, in the light of which the obscurity or ambiguity might be resolved and a different meaning possibly attached to the disputed words from that which on the surface they bear. In some cases it is possible to deduce the "policy" of an Act from its preamble or from its other provisions alone. When these are in themselves neutral or unilluminating, it may be helpful to consider the substratum of law and fact, relating to the trade or other subject-matter in question, which obtained when the Act was passed, on which the Act was superimposed, and in relation to which a "policy" may be spelt out. Such matters as the general lay-out of the trade in drugs before 1941 (any legal or de facto delimitation, for instance, of provinces or lines of business between the qualified and unqualified dealers) might, viewed side by side with the provisions of the Act, indicate the mischief at which the Act struck and thus assist in its interpretation. But the first step is to construe the relevant words in abstraction from this background, to construe them, as it were, in vacuo. So regarded, their true construction appears to this court to be that favoured by the plaintiffs. We base this view on the following considerations. In the first place, it is the "terms" of the reference (inscribed on what will be called for short "the "label")—it is these terms themselves which must be "cal"culated to lead to the use" of the substance for the prevention or treatment of any ailment, not the knowledge which the public happens to possess about its efficacy for any ailment, nor yet an amalgam or conglomerate of those terms and that knowledge. Secondly (a consideration tending the same way), this is a statute which affects with criminal liability unqualified persons selling "substances recommended as medicines." Parliament would not, we think, have desired to impose on the vendor the duty of gauging to a nicety how far it is within the knowledge of the general public that a particular medicine is a remedy for a particular ailment, and to make criminal liability vel non depend

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on the accuracy of what may be a highly speculative computation. For the purposes of the criminal law persons are presumed to know (and to know that others know) the meaning of plain English; but they are not presumed to know how far others know the therapeutic purposes to which particular medicaments are put. If, however, the defendants' construction is right, the vendor is required at his peril to know this; and, indeed, to do more, namely, to divine the state of knowledge of the individual customer, for the question whether the terms of the label are "calculated to lead to the use" covers "use" by that customer, and so far as it does so, it is the knowledge of that customer which is relevant. The words are not limited to use by the public at large. It is surely sensible to suppose that Parliament intended the vendor to apply a test less conjectural, less problematic, more objective. Such a test is available and can be applied quite simply, if what the vendor has to consider is not the assumed knowledge of the general public or individual numbers of it, but the actual contents of the label: this who runs may read, and tell beyond a peradventure whether it does or does not specify an ailment or group of ailments for which the substance is recommended. Indeed, if the contrary criterion is assumed, importing the knowledge of the consumer and spelling out a "recommendation" from the aggregate of this knowledge plus the written terms, singular consequences follow. On this assumption, liability to a 20*l*. fine may result from the unqualified vendor's act in simply labelling a bottle of, say, aspirin with the word "aspirin," provided the general public, or the particular customer, know that aspirin is good for headaches.

A bald, accurate description of the substance sold, without more, would, if the consumer's knowledge derived aliunde is suffered to eke it out, amount to a "reference" to it in "terms "which would be calculated to lead to its use" for the purpose described in the definition. We cannot believe that the legislature intended such grave consequences to follow from calling a spade a spade, and the learned judge manifestly thought the same when dealing with the case of the senna pods described on the label as "senna pods" without more.

For these reasons the court is of opinion that the words of the definition (construed by themselves, in abstraction from any legislative content or historical background) are not satisfied unless the written terms indicate that the substance is a remedy for an ailment or ailments specified in such written terms, and that if all that the written terms contain is an accurate description of the substance or of its ingredients, it is not a "substance recommended" within the definition. When this canon is applied to the three substances under review it would appear in each case to rule them out of that category, since in each case the written "terms" are purely descriptive. In the case of fluid extract of cascara sagrada the label contains the inscription "B.P." and prescribes the dosage. If the consumers' knowledge is excluded, this means merely that the preparation is compounded according to the formula and standard of purity set out in the British Pharmacopœia, one of the monographs of which is headed "liquid extract of "cascara sagrada" and sets out the ingredients of this substance together with a maximum or minimum dose. This monograph itself is simply a description of what constitutes "liquid" or "fluid" extract (the two are stated in the text to be synonymous) of cascara sagrada. The reference to proper dosage on the label and to maximum and minimum dosage in the British Pharmacopœia certainly implies that the substance is to be used as a medicine for some ailment or ailments, but neither on the label nor in the Pharmacopœia is there the smallest hint as to the nature of the ailment or ailments for which it is to be used. So again with "compound rhubarb "pills, dose one or two at bed-time," plus the name of the suppliers. The "B.P." is not referred to in this case. But here, as before, while the words relating to dosage imply that the substance is a medicine, there is nothing to indicate for what it is a medicine. In the third case the label contains the words "extra strong effervescing powders prepared by Carter & Sons, "Sheffield—war-time substitute for seidlitz powders." The same considerations apply here also. Moreover, such a label stands on precisely the same footing for present purposes as a label simply marked "seidlitz powders." If it had been so marked, it would have been the barest of bare descriptions, like a label marked "senna pods" without more. In the case of senna pods the learned judge himself excluded the knowledge of the public. The principle on which he did so logically extends to the case of the seidlitz powder substitute, and, indeed, in our view, to all the three disputed cases. Either the consumer's knowledge can be prayed in aid in supplement of the written "label" or it cannot. If it cannot, the defendants fail. If it can, a mere descriptive word—say "aspirin" without more—on the label (plus the consumer's knowledge) is enough (just as sufficient as that word plus something about dosage or the

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British Pharmacopœia) to impress the medicament with the stamp of a substance recommended as a medicine. Once the consumer's knowledge is assumed to be a relevant supplementary factor, there can be no material distinction between a label which reads "aspirin" simpliciter, and one which adds information as to dosage and the like.

In our opinion, therefore, there is no real doubt or ambiguity as to the meaning of the relevant words. But let us assume that there is room for such doubt or ambiguity and proceed to the second factor which would then have to be considered, namely, matters extrinsic to the definition but possibly affecting its interpretation. Prominent among these (but not exhaustive of them) is the condition of the law and practice in relation to the exaction of customs duties on the sale of medicines previous to 1941. What was this condition? Was it such as should lead the court to revise the construction of the words "substance "recommended as a medicine" provisionally arrived at on the basis of the bare language of the Act of 1941, either by pointing to a specific policy underlying the material provisions of that Act, or otherwise? We must go back to the Medicines Stamp Act, 1812, but need not go back further. This Act was in force for over a century until repealed by the Act of 1941. It charged with duty the substances named or described in its schedule. The schedule begins with a list of specific preparations. Then follow words charging generally all substances which fall within certain named categories. The general charging provision can, in part, safely be paraphrased. The subject matter of the charge consists of "all pills powders, etc. . . . . to be used ". . . . as medicines for the prevention cure or relief of any "disorder or complaint . . . . affecting the human body ". . . . vended . . . . by any persons whatsoever," provided they fall into any of four named categories. These categories are (1.) occult or secret remedies, (2.) proprietary remedies, (3.) patented remedies, (4.) (and most material) remedies which in certain terms (public notices or advertisements, labels and the like) are "held out or recommended to the public by the "makers, vendors or proprietors thereof as nostrums or "proprietary medicines, or as specifics, or as beneficial to the "prevention, cure or relief of any distemper, malady, ailment "or complaint incident to or in any wise affecting the human "body." We are concerned first with the question whether under this provision duty would have been legally exigible, or would, in fact, and in practice, have been exacted, by the customs authorities before 1941 in respect of the three substances involved in this appeal, bearing the labels which they in fact bore. As a matter of legal construction we are of opinion that the words "held out or recommended . . . . as beneficial ". . . . for the prevention cure or relief . . . . of any . . . . "ailment" are not satisfied unless the label or other written terms specify the particular ailment or ailments concerned. The matter can be tested in this way. If the question were asked: "Did the label recommend the substance as beneficial "for the relief of any ailment" an affirmative answer surely could only truthfully be given if the label indicated a particular ailment or ailments for which the substance was recommended as beneficial. There is no clear cut authority on the construction of these words which recur without any material alteration in the Venereal Diseases Act, 1917, s. 2, sub-s. 2. But, on principle, in the case of both Acts we think the construction above indicated is right. In the case of the provision in the Venereal Diseases Act, 1917, if the alternative interpretation prevailed, any seller of, say, mercurial ointment, advertised simply as such, would be criminally liable, because it is known to purchasers (or some of them) to be used in the treatment of venereal disease, although it has other uses too.

But whether or not the duty would have been legally exigible on the true construction of the Act of 1812 in respect of the substances under review, is perhaps less material than whether duty would in practice have been enacted in respect thereof by the Stamp Authorities. On this we are assisted by a statement agreed between counsel which reads as follows: "It is agreed "that the passage in Alpe's Handy Book of Medicine Stamp "Duty beginning at p. 78, l. 1, represents the practice of the "Commissioners in enforcing the Medicine Stamp Duties until "their repeal." The passage in Alpe reads: "It is a good "general rule that a medicine is liable to duty if the description "is one that would enable a purchaser unacquainted with the "virtues and efficacies of the drugs of which it is composed to "doctor himself for any ailment, or class of ailments. The "holding out or recommendation may be conveyed by the title, "as 'corn cure,' or in the body of the description, or even in "the directions for use. The holding out or recommendation "must be for some ailment, or class of ailments; that is to say, "some ailment or class of ailments must be indicated or "mentioned." The statement agreed between counsel continues: "It is also agreed that packages bearing the labels "exhibited for fluid extract of cascara sagrada, and compound "rhubarb pills, would not have been required by reason of the "labels to be stamped." (It will be seen that this specific admission does not extend to the "effervescing powders" though the approved passage from Alpe would seem clearly to cover this substance also. We were told that the reasons for this was the discovery at a late stage in the proceedings that this remedy was patented in 1823 and would have been liable to duty before 1941 under that head.)

This then was one leading general feature of the status quo before the Act of 1941, namely, that duty would, in practice, not be imposed because the medicine was "held out or recom-"mended" unless some ailment or class of ailments was indicated or mentioned. The second was that under the third exemption in the schedule to the Act of 1812, as construed in *Farmer* v. *Glyn-Jones* (1), qualified dealers were exempt from stamp duty on sales of certain "known admitted or approved" medicines, sales of which by unqualified dealers attracted the duty. In practice this discrimination squeezed the unqualified dealer out of this field. The exempting paragraph in question relieved of duty "mixtures," etc., vended by qualified dealers, and by such dealers only, in the event, and in the event only, of such mixtures being "known, admitted or approved" remedies. The exemption is denied when the mixtures, etc., are (*a*) occult, (*b*) proprietary, (*c*) patented or (*d*) "held out or recommended" (by its label or other specified written media) by the "owner "proprietor or first vendor" (these words are different from the corresponding words in the charging section) "as beneficial "for . . . . the relief of any ailment . . . .," etc. In *Farmer* v. *Glyn-Jones* (1) a retail chemist had affixed to a bottle a label reading "Ammoniated Tincture of Quinine—B.P. A well-"known and highly recommended remedy for Colds and "Influenza.". . This was a "known admitted and approved "remedy"—its composition was notorious. The chemist was held on a case stated by magistrates not liable to duty, because the preparation was not occult, proprietary, or patented, and because although it was recommended by him, it was not recommended by the "owner proprietor or first vendor" (the latter being the wholesale supplier, who had not affixed the label). Henceforward a retail chemist, in the case of a whole range of remedies whose composition was disclosed, could sell them duty

(1) [1903] 2 K. B. 6.

free, notwithstanding that he labelled them as remedies for named complaints.

We may now summarize the salient features of the position on the eve of the enactment of the Act of 1941 under the following heads: (1.) Qualified and unqualified persons alike were in law free to sell any medicines they chose; nor were they bound in law to disclose the composition of such medicines. The discrimination between the two operated not through any one-sided prohibition of sales but through the differential incidence of the Stamp Duties. (2.) Up to a point there was no discrimination at all. When the label, etc., did not specify an ailment or class of ailments, duty was in practice exacted from neither. (3.) It was expressly agreed by counsel that neither qualified nor unqualified dealers would have been liable to duty in respect of two of the three substances in dispute in this case, and the passage in Alpe seems clearly to cover the third. (4.) Neither qualified nor unqualified dealers could escape duty on proprietary medicines. *But* (5.) Under the law as declared in *Farmer* v. *Glyn-Jones* (1) retail chemists might lawfully sell (duty-free) a large range of " recommended " medicines if their composition was disclosed, whereas grocers were subject, in respect of such sales, to duties of prohibitive weight (for example, 3*d*. in the shilling, and the like). This confined a very substantial class of business in practice to qualified dealers.

Such are the relevant antecedents of the Act of 1941. Do the terms of that Act, in the light of these antecedents, disclose any distinct " policy ? " Apart from the regulation and restriction of the sale of poisons (ss. 1-10) and the requirement in s. 11 that all " substances recommended as medicines " (a category which on either construction admits of many exceptions) should have their composition declared, the Act has, in our view, no coherent governing aim. For instance, if the policy had been to prevent unqualified persons from recommending substances as remedies, why are all persons, unqualified as well as qualified, left free to give any oral recommendations they choose? Why again, when the sale of " substances recommended " is limited by s. 12, sub-s. 1, to qualified persons, is it made possible by sub-s. 5, for grocers or other unqualified persons (subject to certain conditions) to escape this limitation by selling such substances under a " proprietary description "— a perfectly easy thing to do? Why prohibit them from selling " Liver Pills " but leave them free (subject to certain con-

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ditions) to sell " Smith's " or " Jones' " Liver Pills ? And why are unqualified dealers by sub-s. 4 enabled to escape it when selling herbs ? These provisions, far from suggesting any consistent policy of inhibiting unqualified persons, suggest rather an intention merely to preserve or to establish a certain balance between the various interests involved, chemists, grocers, herbalists and so on ; and if the changes wrought by the Act divest any such interest of advantages previously enjoyed, to see that such interest is (in meal or in malt) compensated for its sacrifice. For instance, the Act (by s. 14) sweeps away the old Stamp Duties which over the preceding century had been found administratively a troublesome impost. If the Act had stopped there, the pre-existing equilibrium between the interests would have been gravely disturbed. Before the Act the exemption from duty of qualified dealers in respect of " known admitted and approved " remedies, coupled with the liability of unqualified ones to a duty of crushing severity in respect of such remedies, had vested, within that field, a de facto monopoly in the former. A simple repeal of the duties, without more, would have destroyed this monopoly and swept a mass of business out of the hands of the chemists into those of the grocers. Hence a compromise. Under the Act, on the one hand the previous de facto monopoly of the qualified in the sphere of " known admitted and approved " medicines is replaced by a legal monopoly of " substances recommended " as medicines " ; but, on the other hand, the unqualified are within limits empowered to do what they could never do before without paying a prohibitive duty, namely, to sell recommended medicines with a " proprietary designation " (or to sell herbs). To prevent a mere repeal of the duty conferring a windfall bonus on the unqualified at the expense of the qualified, the latter are given a nominal monopoly, which offsets that bonus. Then to compensate the unqualified, loopholes and leaks are opened in the monopolistic structure, whereby in some form and degree these benefits (or equivalent ones) percolate back to them—to grocers under s. 12, sub-s. 5, to herbalists under s. 12, sub-s. 4. This parcelling out of benefits, spheres of influence and consolation prizes is stamped with the hallmark of practical compromise, and is utterly repugnant to the operation of any clear cut principle or policy.

A comparison, therefore, of the Act with the status quo on which it was superimposed in our view does nothing to displace the meaning of the disputed words as deduced from the bare terms of the 1941 definition, if this were in doubt. It is true that the words of that definition differ from the corresponding words ("held out or recommended," etc.) in the charging provision of the 1812 Act. But if the new formula had been intended by Parliament to be radically different from the old formula as understood and enforced for over a century under the Medicines Stamp Act, 1812, nothing would have been easier than for Parliament to make this plain, for example, by adding to the definition some such words as "whether or not such ailment is specified in such label, advertisement," and so on. Indeed, the difference in language admits of a simpler explanation. No doubt it was desired to substitute for the sprawling inartificial draftsmanship of the schedule to the 1812 Act something shorter and tidier.

Can any light be thrown on the formula in the definition by reference to its occurrence elsewhere in this or similar Acts? The identical words "terms calculated to lead," etc., occur in ss. 8 and 9 of the same Act and in s. 4 of the Cancer Act, 1939. Section 9 of the Act of 1941 does not perhaps help but s. 8 of that Act and s. 4 of the Cancer Act seem to support the construction propounded above. In the latter case, for instance, the section reads: "(1.) No person shall take any part in the publication "of any advertisement . . . . (*b*) referring to any article or "articles of any description, in terms which are calculated to "lead to the use of that article, or articles of that description, "in the treatment of cancer." If the defendants' argument is well founded, it logically carries them as far as to say that an advertisement simply of "radium" for sale would involve a criminal offence, if it were common knowledge that radium is used in the treatment of cancer. This we feel cannot be right. Similar considerations apply to s. 9 of the Act of 1941. If the defendants are right, an advertisement of "Lung tonic" which does not designate any of the ailments enumerated in the section would be an offence, vis-a-vis a purchaser who thought lung tonic was a remedy for, say, tuberculosis, which is one of the ailments therein enumerated.

Finally, there is a decided case on the meaning of the definition which, though not binding on this court, is in consonance with our conclusions. In *Nairne* v. *Stephen Smith & Co.* (1), Atkinson J., in construing the definition in s. 17 accepted the view that the words "any ailment" means some specific ailment, and held that bottles of "Hall's Wine"

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labelled in terms recommending it as a remedy for "all run "down conditions," were substances recommended by the label for a specific "ailment" within the definition.

For these reasons we think the three substances, labelled as they were labelled, were not "substances recommended as "medicines" within the Act, with the consequences that they can lawfully be sold by unqualified persons notwithstanding s. 12, and that their composition is not required to be disclosed under s. 11. The appeal must be allowed.

Appeal allowed.

Solicitors: *Constant & Constant; Thompson, Quarrell & Megaw.*

H. C. G.

ROXBURGH J.

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Mar. 11; *Apr.* 15.

In re A RECEIVING ORDER (IN BANKRUPTCY).

Bankruptcy—Receiving order—Registration under Land Charges Act, 1925—*Discharge—Re-registration of receiving order by official receiver sixteen years after discharge—Application to vacate registration—Land Charges Act,* 1925 (15 *Geo.* 5, *c.* 22), *s.* 6, *sub-ss.* 1 (*c*), 3, 5—*Bankruptcy Rules,* 1915 (*St. R. & O.* 1914, *No.* 1824/L. 47), *r.* 181A.

A receiving order in bankruptcy was made agaist A. on May 10, 1927, and he was adjudicated bankrupt on July 26, 1927. He obtained his discharge on June 29, 1930. The original registration of the receiving order under the Land Charges Act, 1925, expired on May 10, 1932. In June, 1946, A. entered into a contract to sell certain properties of which he was the absolute owner and as to which he was registered with an absolute title at the Land Registry. The purchaser having repudiated the contract, the official receiver (as a result of correspondence between the purchaser's solicitors and (1.) the Chief Land Registrar and (2.) the official receiver) applied for and obtained re-registration of the receiving order on December 13, 1946, under s. 6 of the Land Charges Act, 1925. A. applied to the court, by motion, for the vacation of that registration:—

Held, that it was doubtful whether the official receiver had statutory power to re-register the receiving order, but that, if he had that power, it was one which ought to be exercised with great care and a sense of responsibility—at any rate after a bankrupt had been discharged; and that in the present case, in view of the circumstances, the court would order it to be vacated.

MOTION.

This was a motion that the re-registration of the receiving order in bankruptcy, made against the applicant on May 10, 1927, and re-registered by the respondent, the official receiver, under s. 6 of the Land Charges Act, 1925, in the Land Registry on December 13, 1946, be vacated or discharged.

The applicant was adjudicated bankrupt on July 26, 1927, and obtained his discharge on June 29, 1930. The original registration of the receiving order under the Land Charges Act, 1925, expired on May 10, 1932. At the date of the order he was entitled to an absolute reversionary interest in certain properties and this interest was duly disclosed to his trustee in bankruptcy. These properties were (in the events which happened) assigned to the applicant and he was registered as proprietor of a portion of the property on April 11, 1934, and of the remainder on June 4, 1942, with an absolute title, at the Land Registry. In June, 1946, he entered into a contract to sell the properties and, the purchaser having repudiated the contract, he commenced an action against him for specific performance. As a result of correspondence between the purchaser's solicitors and (1.) the Chief Land Registrar, and (2.) the official receiver, the official receiver applied for and obtained, on December 13, 1946, re-registration of the receiving order. The applicant made the present application for the vacation of that order.

Harman K.C. and *Platts Mills* for the applicant.
V. R. Aronson for the respondent.

Cur. adv. vult.

Apr. 15. ROXBURGH J., reading a judgment, stated the facts, substantially as above set out, and continued: On December 6, 1946, the purchaser's solicitors, addressed the following letter to the chief land registrar: " We are acting for [the purchaser], " who in June, 1946, contracted to purchase the above property " from [the applicant]. The matter is now the subject of " litigation as our client claims rescission of the contract on the " grounds that he was induced to sign the contract by a " misrepresentation, and [the applicant] is claiming specific " performance. In the course of investigation we have " ascertained by search in bankruptcy and inspecting the will " of [the applicant's] father at the Wills Registry that," and then they set out a number of matters relating to the title which they have ascertained. Then the letter continues: " It appears from a search of the Register of Title that [the "applicant] secured registration of himself with an absolute "title to the [estate] on April 11, 1934. We are unable to "understand how [he] would have been in a position to obtain "such registration having regard to the vesting of his interests "in the estate in the trustees and/or official receiver by reason "of his bankruptcy. Inquiries at the Bankruptcy Court have "elicited the fact that the interests that came to the trustees "and/or official receiver have not been disposed of although "they may well have been regarded as of no value at the time "having regard to the charges secured thereon, but the "existence of the charges would not of course affect the title to "the equity. We should be much obliged if you would "kindly investigate the matter, if possible without referring to "[him] or informing us before you contemplate communicating "with him. If it would be of assistance we should be happy to "call upon you by appointment."

On December 11, 1946, the purchaser's solicitors addressed the following letter to the official receiver: "Dear Sir, We are "acting for [the purchaser] and enclose herewith a copy of a "letter which we addressed on the sixth instant to the chief "land registrar." Then they referred to a recent case in the High Court of Justice relating to the property in question and the letter then continues: "In these circumstances it appears to us to be clear," and then they set out their contention as to the title. Then the letter continues: "The chief land registrar in answer to our letter of "the sixth instant adopted the attitude that [the applicant] "had an absolute title, that the registry could do no wrong, "and if the official receiver had any claim he would have "exercised that claim before now. The land registrar also "pointed out that if he proved to be wrong in registering the "absolute title the persons who had taken interests after the "date of registration could be compensated out of the fund "under his control. We trust that you will regard this letter "as confidential and not communicate with [the applicant] "at any rate without reference to us. If you decide to contest "the registration on the information available then the matter "will clearly come to [his] knowledge, but if you do not contemplate taking any action then we should appreciate your "not bringing the matter to [his] attention."

On the day following the receipt of this letter, namely, on December 13, 1946, the official receiver applied for re-registration of the receiving order under the Land Charges Act, 1925, on a form which I will scrutinize later. But I will first of all describe the procedure for obtaining registration and its effect. I will then consider the powers of the official receiver in connexion with registration, and the circumstances in which he exercised or assumed the power to re-register the receiving order in question. Finally, I will give my reasons for vacating the registration and for making the order as to costs which I feel bound to make.

Referring to the Land Charges Act, 1925, s. 6, I will read part of sub-ss. 1, 3 and 5: "There may be registered in the register "of writs and orders . . . . (*c*) any receiving order in bankruptcy "made after the commencement of this Act, whether or not "it is known to affect land." Sub-section 3 says: "The "registration of a writ or order in the said register ceases to "have effect at the expiration of five years from the date of "registration, but may be renewed from time to time, and, if "renewed, shall have effect for five years from the date of "renewal." Sub-section 5 says: "The registration of a writ "or order affecting land may be vacated pursuant to an order "of the court or a judge thereof." Then s. 23, sub-s. 1 says: "As respects pending actions, writs, orders, deeds of arrange- "ment and land charges (not including local land charges) "required to be registered or re-registered after the commence- "ment of this Act, this Act shall not apply thereto, if and so "far as they affect registered land, and can be protected under "the Land Registration Act, 1925, by lodging or registering a "creditor's notice, restriction, caution, inhibition or other "notice." Then s. 19, sub-s. 2, says—and this is a very important provision—"As respects the registration and re- "registration . . . . (*b*) of a receiving order in bankruptcy "as an order affecting land; rules may be made under and "in the manner provided by s. 132 of the Bankruptcy Act, "1914, as if the registration and re-registration were required "by that Act."

The Land Registration Act, 1925, s. 61, sub-s. 3, says: "The "registrar shall, as soon as practicable after registration of a "receiving order in bankruptcy under the Land Charges Act, "1925, enter an inhibition (in this Act called a bankruptcy "inhibition) against the title of any proprietor of any registered "land or charge which appears to be affected." Sub-section 4 says: "From and after the entry of a bankruptcy inhibition "(but without prejudice to dealings with or in right of interests "or charges having priority over the estate or charge of the

" bankrupt proprietor), no dealing affecting the registered land " or charge of the proprietor, other than the registration of the " trustee in bankruptcy, shall be entered on the register until " the inhibition is vacated as to the whole or part of the land or " charge dealt with." Section 144 provides: " Subject to the " provisions of this Act, the Lord Chancellor may" with certain advice and assistance which I need not particularize " make general rules" for the purposes mentioned in that section.

Land Registration Rules, 1925, No. 180, provides: " A bankruptcy inhibition shall be entered in the Proprietor- " ship Register in the following form, ' Bankruptcy Inhibition. " ' No disposition or transmission is to be registered until a " ' trustee in bankruptcy is registered,' and notice of the entry " shall be given to the proprietor." Then r. 181: " Where " . . . . (*e*) the bankruptcy proceedings do not affect or have " ceased to affect the statutory powers of the bankrupt under " the Act, the registrar shall, as soon as practicable after " receiving notice thereof and after making such inquiry and " giving such notices (if any) as he shall deem necessary, take " such action in the matter as he shall think advisable."

Bankruptcy Rule No. 181A, says: " On the making of a " receiving order the official receiver named therein shall, as " soon as he is notified of the making of such receiving order, " or in the case of a stay of advertisement forthwith after such " stay has ceased to operate, give notice of the same to the chief " land registrar, with a request that such receiving order may " be registered in the register of writs and orders affecting " land." Form No. 33A is the form applicable to such a notification. After formal parts it states: " A receiving order " was made on the [blank] day of [blank] against the above " named debtor. The petitioner is," and then his name is, of course, left blank. " I hereby apply for registration thereof " in the register of writs and orders affecting land pursuant to " s. 6 of the Land Charges Act, 1925," and then it is dated and signed by the " official receiver attached to the above-named " court," that is the court in the title, and it is addressed to the chief land registrar.

Mr. Harman has submitted that Land Charges Act, s. 6, sub-s. 3, is only available if the application for renewal is made before the expiration of the original registration, but I shall assume, without deciding, that this is not so.

The official receiver, however, derives his powers as such from the Bankruptcy Act, and while the Land Charges Act, 1925, contemplates that rules may be made under the Bankruptcy Act not only with regard to registration but also with regard to re-registration, it is conceded that no rules of the latter class have ever been made. Rule 181A could not justify registration in 1946 of a receiving order made in 1927. The absence of any rule providing for re-registration is remarkable. It may well be that in certain circumstances the official receiver ought to be given an express power of re-registration; but if so, its use after the discharge of a bankrupt might require restriction, because discharge ought so far as practicable to allow the bankrupt to rebuild his reputation, and it is a strong measure automatically to attach to any registered land which he may acquire after his discharge an inhibition in the following form: "No disposition by the proprietor of the land or transmission "is to be registered until a trustee in bankruptcy is registered"—an inhibition couched in language singularly inappropriate to the case of a bankrupt already discharged. Moreover, if it is desirable to empower the official receiver to take this serious step merely by way of precaution pending inquiry even in cases where there is no suggestion that any asset has been concealed in the bankruptcy, there would seem to be a need for some easier method of vacating the registration in circumstances such as have arisen in the present case than an application to this court, and admittedly there is none. In these circumstances the absence of rule suggests absence of power. Again the examiner who deals with revived cases has never known a case of re-registration before, and he proceeded to adapt for the purpose of this case a form which is not appropriate to re-registration. This is the form as he adapted it. "[After formal parts:] [name of the property] "A receiving order was made on the 10th day of May, 1927 "against the above named debtor. The petitioner is [the "petitioning company's name] whose registered office is "situated at . . . ." They were the petitioners in 1927, and I suppose technically still are, though the bankrupt has been discharged. "I hereby apply for"—and then "regis-"tration" is struck out and "re-registration" is written in its place—"re-registration in the register of writs and orders "affecting land pursuant to s. 6 of the Land Charges Act, 1925. "Dated this 13th day of December, 1946." That is signed by "the official receiver attached to the above named court" and it is addressed to the chief land registrar. Accordingly, I am doubtful whether the official receiver had power to do what he did, and the general question of re-registration of receiving orders appears to merit consideration and elucidation.

But if the official receiver has power to re-register receiving orders, it is a power which ought to be exercised with great care and a sense of responsibility, at any rate after the bankrupt has been discharged. How was it exercised in the present case sixteen years after discharge ?

The examiner received the purchaser's solicitors' letter on December 12, and he immediately started to search available records. He ascertained from a record book that the asset had been disclosed, and from the court file that there was no entry in the trustee's accounts to represent any proceeds of sale of the asset. He then sent a requisition to the Records Keeper for the trustee's file and was informed that it had been destroyed by enemy action. When he found that the file which should either confirm or remove his suspicion that the asset had been overlooked or treated as worthless had been destroyed, it never occurred to him to ask the admittedly honest discharged bankrupt for an explanation, or to look for other sources of information. In fact there were at least two other possible sources, the official receiver's file and a certain book which the examiner thought of after the re-registration had been effected and which did contain some relevant entries. Instead, he went off to the solicitors who have advised the official receiver in this case, and on their advice, after only one day's inquiry, re-registered this ancient receiving order on December 13, 1946. A novel step of this serious character could hardly have been more lightly taken.

It appears that the examiner knew (1.) that the reversionary interest had been disclosed by the applicant in his bankruptcy, (2.) that his informants were by no means disinterested, (3.) that the trustee's papers had been destroyed by enemy action. He had, it is true, one ground for suspicion, in that the account of the trustee in bankruptcy, which he had found, showed nothing which could represent the price of the reversionary interest. This is still unexplained. But he knew that it had been the trustee's duty to realize the asset for the benefit of the creditors and that he was an experienced trustee, and he knew that the applicant had obtained registration with an absolute title at the land registry and he knew how to get in touch with him to ask for an explanation. Moreover, there was no special reason for urgency seeing that (as he knew) litigation was pending about the sale of the land. He ought, in my judgment, in such circumstances to have made inquiries of the applicant, and to have completed his own investigations, before attempting to re-register this very old receiving order. The haste with which he acted puzzles me. I acquit him without hesitation of any intention to assist the purchaser's solicitors to the detriment of the applicant. But he should, in my judgment, have been on his guard against such a possibility, and he was not. Moreover, he clearly underrated the serious consequences of the unique step which he was taking. It is only fair to him to recall that he told me that he acted on the advice of solicitors. As he stated in evidence that the registration of the receiving order no longer served any useful purpose, I can have no hesitation in ordering it to be vacated. Its presence on the register to-day, and the inhibitions at the land registry which automatically flow from it, cannot but damage the credit of the applicant and violate the spirit of the bankruptcy law. The applicant was discharged some sixteen years ago, and the official receiver has expressly disclaimed any suggestion that he concealed any assets in his bankruptcy.

The only question of any difficulty is whether I ought to order the official receiver to pay the applicant's costs. The official receiver, through one of the officers of his department and on legal advice, having or assuming a power which ought always to be exercised with particular care, exercised it without sufficient care, without adequate inquiry and in undue haste. Moreover, when it became apparent to him, or his officer or advisers, that the maintenance of that registration was unnecessary for any purpose of his, but was embarrassing the applicant, he gave him no assistance to secure its removal, but on the contrary at the outset opposed this motion. On these grounds I must order him to pay the applicant's costs.

Solicitors: *N. A. Woodiwiss & Co.; Tarry, Sherlock & King.*

J. L. D.

WYNN-PARRY J.

1947

Apr. 15, 16, 17, 18, 23, 24, 25; *May* 7.

In re DUKE OF WELLINGTON.
GLENTANAR *v.* WELLINGTON.

International Law—Will—English and Spanish wills—Movable and immovable property in Spain—Devolution—Renvoi.

The first Duke of Wellington was, in 1812, created a Spanish grandee with the title of Duke of Ciudad Rodrigo, and certain Spanish estates were, in 1813, adjudicated to the Duke of Ciudad Rodrigo for himself his heirs and successors. On the death of each of the first five dukes the Spanish estates passed to his successor in the dukedom under his testamentary dispositions. The sixth duke, however, was killed in action in 1943, being at his death a bachelor, and on his death the dukedom of Wellington vested in his uncle and the dukedom of Ciudad Rodrigo vested in his (the sixth duke's) sister. By a Spanish will the sixth duke devised and bequeathed his Spanish estates to " the person who being of " the issue of the late Most Noble Arthur Duke of Wellington and " Ciudad Rodrigo my great great grandfather will on my decease " become Duke of Wellington and Ciudad Rodrigo for his absolute " benefit." He also subsequently made an English will, disposing of the remainder of his property and specifically excepting therefrom the property disposed of under the Spanish will. A summons was taken out to determine how the Spanish property devolved on the death of the testator :—

Held (1.), that, following the general rule, the question of succession to the movable property of the testator comprised in the Spanish will, must be determined by English law; (2.) that Article 10 of the Spanish Civil Code showed the insistence of the Spanish law of succession on the principle of the unity and universality of the succession, and it was for that reason that in case of succession the lex patriæ was substituted for the lex domicilii and the lex situs, and that, having regard to the evidence, it would be against the spirit and intendment of the Spanish Civil Code to hold that, in a case such as this, the Spanish law would accept the renvoi which the English law made to it as the lex situs; and that according to Spanish law the question of the devolution of the immovable property in Spain must be resolved by reference to English law; (3) that, looking at the Spanish will, no one person existed, who fulfilled both qualifications, and, therefore, the gift failed, but that the present Duke of Wellington was entitled under the English will to the Spanish property, movable and immovable, comprised in, but ineffectually disposed of, by the Spanish will; and (4.) that the interposition of the administration trusts before the absolute gift to the present duke did not make the English will ineffectual to pass the Spanish property.

ADJOURNED SUMMONS.

The following statement of facts is taken from the judgment.

In January, 1812, following the storming of the fortress of of Ciudad Rodrigo, the first Duke of Wellington, then Viscount Wellington, was created a grandee of Spain of the first class for himself and his successors, free of nobility duties and fees, with the title of Duke of Ciudad Rodrigo, the deed of February 5, 1812, carrying into effect the Royal Decree of January 30, 1812, providing that the grandeeship of Spain and the dukedom of Ciudad Rodrigo should be enjoyed by him and his issue, successors male and female, each in his time in perpetuity. By a deed of July 22, 1813, it was provided that "there be adjudicated to the Duke of Ciudad Rodrigo for him- "self his heirs and successors the Royal Site and possession "known in the plain of Granada as the Soto de Roma including "therein the lands called the Chauchinas which are found "situated within the same boundaries of the Soto in order "that they may hold and enjoy it in conformity with and "subject to the Constitution and the laws."

The first Duke of Wellington was created Duke of Wellington in the peerage of the United Kingdom in the year 1814. He died in the year 1852 and was succeeded both in the British and the Spanish dukedoms by his son, Arthur Richard, second Duke of Wellington. The second duke died in the year 1884 and was succeeded in both dukedoms by his nephew Henry, third Duke of Wellington. The third duke died in the year 1900 and was succeeded in both dukedoms by his brother, Arthur Charles, fourth Duke of Wellington. The fourth duke died in the year 1934 and was succeeded in both dukedoms by his son, Arthur Charles, fifth Duke of Wellington. The fifth duke died in the year 1941 and was succeeded in both dukedoms by his son, the sixth Duke of Wellington, whose testamentary dispositions are in question, and whom I will refer to as the testator. On the deaths of each of the first five Dukes of Wellington the Spanish estates passed to his successor in the dukedoms under his testamentary dispositions, as each of them gave these estates to his successor either by name or by a gift to the person who should, upon his death, become Duke of Wellington and Ciudad Rodrigo. Until the death of the testator, the sixth Duke of Wellington, this form of gift caused no difficulty as there could never have been any suggestion that the Spanish dukedom passed to a person other than the person who succeeded to the dukedom of Wellington.

The sixth duke made a will, dated May 6, 1942 (to which for convenience, I will refer as "the Spanish will"), in the following terms: "I, the Most Noble Henry Valerian "George Duke of Wellington and Duke of Ciudad Rodrigo a "Grandee of the First Class in Spain hereby revoke all my wills "and codicils so far as the same relate to the Place and Royal "Possession known in the Vega de Granada as the 'Sota de "'Roma' inclusive of the lands called respectively the "'Dehes-a-baja of Illora' and 'Las Chauchinas' assigned to "my late great-great-grandfather by the Decree published by "the General and Extraordinary Cortes on the 22nd day of July, "1813, and all arrears of rent due at my death in respect thereof "and all chattels of every kind on the said estate at my death "and I give devise and bequeath all the said estate called the "'Soto de Roma' inclusive of the lands called respectively "the 'Dehes-a-baja of Illora' and 'Las Chauchinas' with "the rights members and appurtenances thereunto belonging "and all arrears of rent due at my decease in respect thereof and "all chattels of every kind which shall be on the said estate at "my death belonging to me unto the person who being of the "issue of the late Most Noble Arthur Duke of Wellington and "Ciudad Rodrigo my great-great-grandfather will on my decease "become Duke of Wellington and Ciudad Rodrigo for his "absolute benefit And I appoint Lord George Wellesley "and Thomas Lord Glentanar Executors of this my Will and "Testament so far as the same relates to my real and personal "property in Spain."

The testator made a further will dated December 6, 1942 (to which for convenience I will refer as "the English will"). This will began as follows: "I, The Most Noble Henry Valerian "Sixth Duke of Wellington hereby revoke all testamentary dis-"positions heretofore made by me except my will dated the "Sixth day of May One thousand nine hundred and forty-two "relating to certain property in Spain (hereinafter called 'my "'Spanish will') and declare this to be my last will save as "regards the property which is disposed of by my Spanish will "which property so disposed of is not intended to be disposed "of or dealt with by this my will which I make this sixth day of "December One thousand nine hundred and forty-two." He then appointed his uncles Lord Glentanar and Lord George Wellesley, the plaintiffs in this summons, to be the executors and trustees of the English will and, after making certain other bequests, bequeathed to them, amongst certain other items: "Thirdly all if any moneys and other personal or movable "property in Spain belonging to me at my death which does "not pass under my Spanish will."

By cl. 5 of the English will the testator provided as follows: "I devise and bequeath all my property real as well as personal "not hereby or by any codicil hereto otherwise specifically "disposed of and of which I can dispose in any manner I think "proper either as beneficially entitled thereto or under any "general power to my trustees upon the administration trusts "contained in Form 8 of the Statutory Will Forms 1925 and "that Form is incorporated herein."

By cl. 6 he provided as follows: "My trustees shall stand "possessed of the investments and property hereinbefore by "reference directed to be made or authorized to be retained "including any part of my residuary estate for the time being "unconverted and the investments and property for the time "being representing the same and the income thereof upon "trust for the person who upon my death shall become Duke "of Wellington absolutely if he shall be of the age of twenty-"one years but if he is under the age of twenty-one years then "upon trust for such person as within the period of twenty-"one years from my death first is Duke of Wellington and of the "age of twenty-one years absolutely but if no person is Duke of "Wellington and of the age of twenty-one years within the said "period then upon trust for the person who immediately prior "to the expiration of the said period is Duke of Wellington "absolutely."

The testator was killed in action on September 16, 1943, being at his death a bachelor and domiciled in England and leaving him surviving his mother, the defendant, Lilian Maud, Duchess of Wellington, and an only sister, the defendant, Lady Ann Maud Rhys. He never had any brothers. The testator's two wills were proved by the plaintiffs on October 13, 1944. The testator was, at his death, entitled to the estates in Spain referred to in the Spanish will and also to the proceeds of sale of parts of such estates, bank balances, cash in hand and arrears of rent in respect of such estates and to certain chattels thereon. On his death the testator was succeeded in the dukedom of Wellington by his uncle Gerald, as seventh duke. The expert evidence established and on this point there was no dispute, that on the testator's death, the dukedom of Ciudad Rodrigo vested in his sister.

A summons was taken out by the trustees of the wills to

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determine the destination of the movable and immovable property in Spain, comprised in the Spanish will.

Rawlence for the plaintiffs.

Jennings K.C. and *Jopling* for the present Duke of Wellington. The Spanish estate passes to the present duke under the Spanish will. If that will failed to pass it, it passes to him under cl. 5 of the English will, as property not otherwise disposed of—that is to say, effectively disposed of. It falls into residue, as, otherwise, the devise would be incapable of taking effect: [see Theobald on Wills, 9th ed., p. 197; *Green* v. *Dunn* (1); *De Trafford* v. *Tempest* (2); *In re Mason* (3); *Blight* v. *Hartnoll* (4); *In re Powell* (5).] The court will, if possible, avoid holding a gift void for uncertainty: [see Theobald on Wills, 9th ed., p. 233]. There has been a misdescription, and it is clear that the person designated is the English Duke of Wellington.

With regard to the question of renvoi, the English law applies to the whole of the testator's property. [*Casdagli* v. *Casdagli* (6); *In re Annesley* (7); *In re Ross* (8).] The question is whether the Spanish law accepts the renvoi. When the Spanish Civil Code is considered, the question arises whether its intention is that the internal law of Spain, or the whole of the law of Spain, including its rules of private international law, is to be applied—see art. 10 (9). [*In re Askew* (10); *Jaber*

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(1) (1855) 20 Beav. 6.

(2) (1856) 21 Beav. 564.

(3) [1901] 1 Ch. 619.

(4) (1881) 23 Ch. D. 218.

(5) (1900) 83 L. T. 24.

(6) [1918] P. 89; [1919] A. C. 145.

(7) [1926] 1 Ch. 692.

(8) [1930] 1 Ch. 377.

(9) Spanish Civil Code, art. 9: "Laws relating to family rights "and duties or to the status, con- "dition or legal capacity of "persons, bind Spaniards though "resident in a foreign country."

Article 10: "Movables are "governed by the law of the "country of their owner; im- "movables by the law of the "country where they are situate. "However, intestate succession as "well as testamentary successions "shall be governed as regards the "order of succession inheritance "rights and intrinsic validity of "the dispositions by the national "law of the person whose succes- "sion it is, whatever be the nature "of the property and the country "in which it is situate."

Article 659: "The estate com- "prises all the rights property and "liabilities of a person which are "not extinguished by his death."

Article 661: "The heirs succeed "to the whole of the rights and "obligations of the deceased by "the mere fact of his death."

(10) [1930] 2 Ch. 259.

Elias Kotia v. *Katr Bint Jiryes Nahas* (1); *Studd* v. *Cook* (2).] The Spanish law resembles the English law very closely and takes the view that the law intended by the testator to govern his wills is prima facie the law of domicile. The suggestion that a trust would not be recognized by Spanish law would not affect the present case, as this is purely an administrative trust, the person entitled to the residue being absolutely entitled, subject to administrative formalities—see Form 8 of the Statutory Will Forms, 1925 (Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. 1, p. 788). The present duke is entitled to be registered as the owner of the Spanish property and, if Spanish law required some document before he was registered, he could call on the trustees to provide him with it. Both wills must be construed according to English law, and the English rules of construction as to movables and immovables must be applied. The present duke is entitled to the whole of the Spanish property passing under the Spanish will.

When the Spanish Code is examined, it is found that the law is the same as the English law with regard to land, except in the case of land owned by persons who are not nationals of Spain. This land is allowed by the law of Spain to devolve in accordance with the law of their country. The exception is dealt with in *Bartlett* v. *Bartlett* (3). [*Concha* v. *Murietta* (4) was also referred to.] If the court does not take the view that the present duke is entitled to the whole of the property passing under the Spanish will and holds that Spanish internal law prevails, he is, in any case, entitled to half of the Spanish estate.

Winterbotham for the testator's sister. This defendant takes under the Spanish will and under no other will. The Spanish will should be construed so as to give her some of the Spanish property, even if it does not give her the whole of it. The point as to falsa demonstratio, introduced by counsel for the present duke, has no application to a will of this kind, because the testator is not attempting, by his language, to describe an existing person, but is leaving the question to be determined at his death, by means of a description rather than a definition of the persons who are to take. It is not a case of a testator having in his mind an individual and misdescribing him. The court has to construe the will as it stands and decide what is the meaning of this phrase. Does it mean one individual, who becomes, at the death of the testator, Duke of Wellington and Ciudad Rodrigo? If so, the gift fails, because no one answers that description. Or, can it be read as "those persons who become Duke of Wellington and Duke of "Ciudad Rodrigo?" If that is possible, the words operate to give the property to the two persons, who acquired those titles —namely, the present duke and the testator's sister—jointly. This submission is not made on the ground that this construction is in accordance with the deliberate intention of the testator, but is based on the effect which the court is bound to give to the words. The proper interpretation of the phrase is to read the word "person" as "persons."

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(1) [1941] A. C. 403.
(2) (1883) 8 App. Cas. 577.
(3) [1925] A. C. 377.
(4) (1889) 40 Ch. D. 543.

Gray K.C. and *Wilfrid M. Hunt* for a legal personal representative of the testator's mother, who was interested in the event of an intestacy. The gift was not meant for more than one person, unless anything to the contrary can be spelt out of the words. The only way to deal with the Spanish estate is to deal with it under two separate wills. The testator was clearly contemplating that one person would hold both estates and he did not contemplate what happened. With regard to the Spanish will, he was thinking of his Spanish title and his Spanish estate. Under the Spanish will it is impossible for for anyone to take the property, who is not both Duke of Wellington and Duke of Ciudad Rodrigo. Therefore, there must be an intestacy under that will. As to the English will, it does not profess to dispose of any part of the Spanish estate [see *Blight* v. *Hartnoll* (1)]. In referring to property "disposed "of by my Spanish will," the testator indicates that he does not, in the English will, intend to deal with the Spanish estate. The testator's mother takes the Spanish immovable property as on an intestacy. The English will is ineffectual to pass the Spanish immovable property, because Spanish law does not recognize trusts. It would be misleading to suggest that, under English law, the present duke has an absolute title, which could be registered in Spain. [*Earl Nelson* v. *Lord Bridport* (2) was referred to.]

Cur. adv. vult.

May 7. WYNN-PARRY J., after stating the facts as set out above, continued: In these circumstances doubts have arisen as to the destination of the movable and immovable property in Spain comprised in the Spanish will, and accordingly this summons has been issued by which it is asked, first, whether on the true construction of the Spanish will and the English will and, in the events which have happened, the present duke and the testator's sister, or either, and if so, which of them, is entitled to (*a*) the movable property, and (*b*) the immovable property comprised in the Spanish will or whether the testator died intestate as to the whole or any part of such property; and, secondly, if there is to any extent an intestacy, who is entitled under such intestacy. As the property with which I am concerned consists of foreign movable and immovable property situate abroad, the first point which arises for consideration is the choice of law to be applied in the determination of the questions of succession to which I have referred.

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(1) 23 Ch. D. 218, 222.

(2) (1846) 8 Beav. 547.

As regards the movable property in Spain, no difficulty arises. The testator died domiciled in England, and it is the clear rule of English law, for which at this date no authority need be cited, that the distribution of the distributable residue of the movables of a deceased is in general governed by the law of his domicile at the time of his death. As there are present in this case no circumstances to take it out of that general rule, it follows that the questions of succession to the movable property of the testator comprised in the Spanish will must be determined by English law.

I turn now to the question by what law are those questions of succession to be determined so far as the immovable property of the deceased is concerned. This point presents more difficulty. The first step, it is true, is easy. According to English law, the devolution of the immovable property situated in Spain comprised in the Spanish will is to be governed by Spanish law as the lex situs.

The second step also appears to me to present no difficulty. For when it is asked whether by the phrase "Spanish law" is meant only the internal law of Spain or the whole of the law of Spain, including therein the body of rules of private international law recognized and administered by its courts, the answer is, in my judgment, at any rate so far as this court is concerned, conclusively provided by the following passage from the judgment of the Privy Council in *Jaber Elias Kotia* v. *Katr Bint Jiryes Nahas* (1): "In the English courts phrases "which refer to the national law of a propositus are prima facie

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(1) [1941] A. C. 403, 413.

"to be construed, not as referring to the law which the courts "of that country would apply in the case of its own national "domiciled in its own country with regard (where the situation "of the property is relevant) to property in its own country, "but to the law which the courts of that country would apply "to the particular case of the propositus, having regard to "what in their view is his domicile (if they consider that to be "relevant) and having regard to the situation of the property "in question (if they consider that to be relevant)."

The judgment in question was that of a very strong Board, and although it may be urged that so far as the case before the Board was concerned the observation was obiter dictum, it was put forward as a statement of the law of England on this point, and it is supported by an impressive body of judicial authority, of which reference may be made to *Collier* v. *Rivaz* (1), *Casdagli* v. *Casdagli* (2), *In re Ross* (3), and *In re Askew* (4).

It is at this point that the real difficulty on this part of the matter arises. What is the law which would be applied by the Spanish court, if on the facts which I have stated, the questions as to the devolution of the Spanish property which I have to decide, were being decided by that court? As will emerge later in this judgment, the question comes down to this: does Spanish law recognize and apply the doctrine of renvoi? It is not a difficult question to state, but it is not easy to answer.

It is clear from the expert evidence that in Spain the only court, whose decisions are binding in other cases, is the Supreme Court. The decisions of lower courts may be cited in other courts, but do not bind such courts. In these circumstances, I must address myself to the question, what is the law on the matter in question which would be expounded by the Supreme Court of Spain if it were before that court?

I have had the assistance of the evidence of three Spanish lawyers, Mr. Valls, who is a practising member of both the Spanish and English Bars and Legal Adviser to the Spanish Embassy and the Spanish Consulate-General in London; the Illustrisimo Senor Don Juan de Callejon, a practising member of both the Spanish and English Bars and Mr. Valls' predecessor as Legal Adviser to the Spanish Embassy in London and Dr. Colas, again a member of both the Spanish and English Bars, but who does not now practise in the Spanish courts, though he did so for many years; he is also a Doctor of Law in the University of Madrid. Affidavit evidence was given by Mr. Valls on behalf of the plaintiffs, by Senor Callejon on behalf of the present duke and by Dr. Colas on behalf of the last defendant, the Dowager Duchess of Wellington. Mr. Valls and Dr. Colas were cross-examined before me on their affidavits. Senor Callejon unfortunately died before the hearing, but no objection was taken to his affidavit being read and relied on on behalf of the present duke.

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(1) (1841) 2 Curt. 855.

(2) [1918] P. 89, 111, [1919] A. C. 145.

(3) [1930] 1 Ch. 377.

(4) [1930] 2 Ch. 259.

As regards Mr. Valls and Dr. Colas, they were most satisfactory as witnesses; each made plain his conclusions; each made plain the reasons for his conclusions; the difficulty arises from the circumstances, first, that, as they both agreed, there is no express provision in the Spanish Civil Code, nor any express decision of the Supreme Court, on the question of the applicability of the doctrine of renvoi in Spanish law, and, secondly, that on this matter they arrived at diametrically opposed conclusions. The task of an English judge, who is faced with the duty of finding as a fact what is the relevant foreign law, in a case involving the application of foreign law, as it would be expounded in the foreign court, for that purpose notionally sitting in that court, is frequently a hard one; but it would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain, and two conflicting decisions of courts of inferior jurisdiction.

[His Lordship then read arts. 9, 10 and 661 of the Spanish Civil Code and continued:]

The phrase " national law " in art. 10 is not defined in that article or elsewhere in the Civil Code. It appears to me, as a matter of construction of the language of the article, that it would be possible to interpret the phrase, either as meaning the internal law of the nationality, or as meaning the whole of the law of the nationality including its rules of private international law. It is to be observed that the phrase occurs in the second paragraph of the article in a provision which constitutes an exception to the general rule contained in the first paragraph, and which appears to have as its object the establishment of the

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rule that as regards succession all forms of property shall be governed by the same set of rules. This provides a context on the face of the article leaning in favour of the view that by " national law " is meant the internal law of the nationality. It is not, however, decisive of the matter.

It appears to me to be established by the evidence that in its development Spanish law was much influenced by the continental doctrine of the Statutes—in Spanish the " doctrina " de los Estatutos "—under which a foreigner was accompanied by his civil status and capacity and the laws of his country had to be applied to him when those laws were not opposed to the principles of public order and the interests of the nation in which his claims were formulated. This rule was recognized by the Supreme Court of Spain in two decisions of January 13 and May 12, 1885, and by a subsequent decision of May 26, 1887—that is before the Civil Code was promulgated in 1889. I am further satisfied that the only law recognized by that doctrine was the internal law of the lex patriæ.

It is also established by the evidence that under Spanish law the estate of a deceased person is one and universal wherever the assets are situate and whatever be their nature. This view was advanced by Mr. Valls, who further stated that it is precisely in order to preserve this principle that art. 10 of the Civil Code expressly excludes the lex domicilii and the lex situs from all questions of succession and establishes the lex patriæ. Mr. Valls in support of his view referred to the works of certain eminent Spanish lawyers.

The first reference was to Senor Castan, who is the President of the Supreme Court of Spain. In his work on " Spanish " Civil Law—Common and Regional," 1936, vol. 1, pp. 70–71, he writes as follows : " Rights of Succession—By virtue of the " rule laid down by the second paragraph of art. 10 intestate and " testamentary successions shall as regards the order of " succession and nature of succession rights and intrinsic " validity of the dispositions be governed by the law of origin " of the person whose succession is in question whatever be the " nature of the property and the country in which it is situate. " The personal law of the deceased applies therefore to all " questions appertaining to the material rights in the succession " or (as is the same) to the fundamental rules thereof even if the " forms and formalities of the acts referring to the same are " governed as we shall see by the law of the place where such " acts take place. The withdrawal of successions from the

" real statute is a novelty of the Civil Code taken from the " Italian Civil Code and is based on the necessity of maintaining the unity of the succession and of preventing the estate " from being divided into so many different portions as there " may be territories in which the assets may be situate." Secondly, he refers to Professor Trias de Bes, a Professor of International Law at Barcelona University, who, in his work " Private International Law—Positive System of Spanish Law," 2nd ed., 1939, at p. 31, deals with the same point thus: " Succession—Paragraph 2 of the said art. 10 contains, commencing with the word 'However' which implies an " exception to the statutory distinction—the literal transcription of art. 8 of the Italian Civil Code . . . . This principle " is beyond reproach because the whole matter of succession " in its widest sense is governed wholly in Spain by the national " law of the deceased adopting the principle of the unity and " universality of the succession." Lastly, he refers to Alcubilla, who in his work " The Dictionary of the Spanish " Administration," 6th ed., vol. 3, p. 676, summarizes the question thus: " The solutions and opinions of authors who " write on international law in regard to the statute to be " applied in questions of succession can be condensed into " these three: (1.) To apply either the law of the last domicile " or the national law of the testator; (2.) To follow the rule of " the lex rei sitæ both for movables and immovables, and " (3.) or mixed that is to say to govern immovables by the " real statute and the movables either by the law of domicile " or by the law of the nation of the testator. The Spanish Code " taking its inspiration from the principle of unity of succession " and the principle of the statutes accepts the solution of the " Italian Code thus avoiding the difficulty and absurdity of " dividing the unity of the succession and the possibility that " within a universality of succession there should arise a " plurality of estates where there is only one deceased involved " because possibly the territories in which the assets are situate " may be several."

As I understood his evidence, Dr. Colas did not challenge the view that under Spanish law the estate of a deceased person is one and universal or, putting it another way, the principle of the unity and universality of the succession applies to such an estate: but he did challenge the conclusion which Mr. Valls and the writers to whom I have referred seek to draw as to the effect, having regard to that principle, of art. 10 of the Civil

Code. Dr. Colas maintained that—I quote his words—"Mr. Valls here falls into the error of confusing the Roman "doctrine of hereditas from which these articles clearly derive "the doctrine of the continuity of the legal personality of the "deceased in his heirs (that is, the fact of the succession of the "estate as a universal whole) with the quite distinct question "of the procedural manner or form by which that estate may "pass. In other words, the estate may pass as a universal "whole to several persons, who may be heirs according to "several systems of laws without destroying the integrity of "the estate in the sense in which it is defined in art. 659 because "all the rights property and liabilities legally subsisting on the "death of the person still survive collectively in his heirs." The reasoning of Mr. Valls and the writers to whom he referred appeals to my mind.

In my view, the object of the second paragraph of art. 10 of the Spanish Civil Code is to preserve the principle of the unity and universality of the succession, and it is for that reason that in case of succession the lex patriæ is substituted for the lex domicilii and the lex situs. Again, I say that that does not conclude the matter, but, if I am correct in my reasoning so far, I have ascertained a circumstance which may well assist in answering the question which I have to answer. Indeed, if the matter rested there, I would say that it would be contrary to the spirit and intendment of the Spanish Civil Code to hold that in questions of succession Spanish law should recognize and apply the doctrine of renvoi.

I must, however, refer to the only two Spanish cases on this subject. The first is a case decided on June 30, 1900, by the Juzgado de Hospital, Barcelona—that is what would correspond in this country to a court of first instance. For the report of this case I have to rely on a translation from Clunet, Journal du Droit International Privé, vol. XXVIII., 1901, pp. 905 and 911. "D.T.A., a Scotchman domiciled in Barcelona, died "there, possessor of an important industrial concern; his "estate consisted of the said business, real estate in Barcelona, "securities and movables. The distribution of the estate "between his legatees gave rise to the question as to what law "should be applied in the matter. Article 10 of the Civil Code "prescribes the applicability of the law of the nationality of "the cujus; that is, in the case in question, Scottish law. "But Scottish law in this instance refers to Spanish law as "applicable in Barcelona, with reference to movables of the "deceased under the law of domicile, and with reference to "immovables in accordance with the lex rei sitæ." At p. 911 the judge's decision is transcribed in the following words: "Juge de l'Hospital, Barcelona, 3rd August, 1900. According "to the ruling of art. 10 of the Civil Code, as to which the "succession on intestacy and on testacy, the order of succession, "with reference to the rights of the successors, and the validity "of the dispositions, are governed by the law of nationality of "the deceased person, whatever the nature of the property is "and of the country in which it might be situated. The law of "Scotland should be applicable in view of the fact that the "deceased D.T.A. was a Scottish subject. Scottish law does "not however accept the jurisdiction which Spanish law gives "to it, according to art. 10 of the Civil Code, and refers again "to the latter, by reason of the deceased having left the "movable and immovable property at Barcelona where territorial law should rule the succession. Considering that there "is not any ruling in Spain which can settle this conflict, one "ought therefore, according to art. 10 of the Civil Code, to "refer to established custom or to the general principles of law, "and in this case, following the opinion of the different jurists "and according to the advice of Professor D. Juan de Dios "Trias, Professor of International Law of the University, "there is not the slightest doubt that the succession of D.T.A. "ought to be governed by the law of Catalunia, as the property "left by him was situated in Barcelona."

I cannot consider the reasoning in the last paragraph of this report as at all satisfactory. In the first place, I find in art. 10 no direction to refer to established custom or the general principles of law, whatever the latter phrase may mean; in the second place, no custom or general principles of law are referred to; in the third place, the evidence before me showed that the weight of juristic opinion at the present time is not in favour of applying the doctrine of renvoi, and I am quite unable to assume that in 1900 juristic opinion was unanimous or anything like unanimous in favour of its application; and in the fourth place it is clear that the court was really influenced by the particular opinion referred to, namely, that of Professor Trias de Bes, Professor of International Law at the University of Barcelona. The decision is not one which binds any other Spanish court, and a fortiori not the Supreme Court. I am free, in my endeavour to expound the law, as I consider it would be expounded by the Supreme Court of Spain, to decline to follow that decision and,

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finding it unsatisfactory for the reasons which I have given, I do not propose to follow it.

The other decision to which I must refer is that of the Court of Appeal of Granada of February 7, 1925, affirming the judgment of a lower court. In that case (I read from the affidavit of Mr. Valls) the facts were as follows: "A.L. had died leaving "immovable property in Spain. The plaintiff's case was that "the devolution of the estate should be governed by Spanish "law because A.L. was a Spaniard but if he were English (his "nationality was in dispute) Spanish law should likewise apply "to all questions appertaining to his said immovables on the "application of the doctrine of renvoi. The defendant relied "on the English nationality of the deceased and submitted "that renvoi was not applicable. The court found as a fact "that the deceased was an English national and ruled that the "doctrine of renvoi was not relevant because in the words of "the judgment 'the theory of renvoi . . . . has been recog- "'nized and accepted exceedingly rarely, as in reality it has "'acquired no status in law which nations recognize or incor- "'porate in their respective legislations and in the present case "'such is the clarity and precision of para. 2 of art. 10 of the "'Civil Code that there is no need to search apart from it "'and seek a solution other than that given by the said article "'itself'."

This judgment was reviewed by the Supreme Court of Spain on February 10, 1926, when it was held that the nationality of the deceased was Spanish and not English. Considerable discussion took place before me on the question whether or not the Supreme Court had expressly or by implication expressed its disapproval of the conclusion of the Court of Appeal of Granada that Spanish law rejects the doctrine of renvoi. I do not intend to go into this matter in detail. My conclusion is that it did not do so. I arrive at this after very carefully considering the translation of the relevant parts of the judgment. On the other hand, sitting as the Supreme Court of Spain, I have now to consider the judgment of the Court of Appeal of Granada, and, with all respect, on the extract from the report which is before me, I find it as unsatisfactory as that of the Court of Barcelona. I cannot accept that in the year 1925 "the theory "of renvoi has been accepted exceedingly rarely." To take but two examples, it is clear that by that year it had been embodied in the statutory law of Germany and had been recognized by the courts of France. It is true that the doctrine has been assailed in no uncertain terms by the jurists of all nations and epithets of varying intensity have been used in the attack, but the statement that it has been recognized and accepted exceedingly rarely, as in reality it has acquired no status in law which nations recognize or incorporate in their respective legislations, is a statement made in the teeth of the facts as they existed in the year 1925. Therefore, on the basis of the extract of the judgment in that case, with which I have been furnished, I am of opinion that it provides me with no trustworthy guide to the solution of the problem before me.

In this state of the evidence I am thrown back on the wording of art. 10 of the Civil Code, containing in its language the pointer to which I have referred, the insistence of the Spanish law of succession on the principle of the unity and universality of the succession: the extent to which before the introduction of the Civil Code in 1889 Spanish private international law had been influenced by the doctrina de los estatutos with its insistence on the internal law of the lex patriæ: the circumstance that, to put it no higher, there exists a strong cleavage of opinion among Spanish jurists of whose views the Spanish judges will take cognizance for the purpose of making up their minds on a question such as this in regard to which no binding authority exists: and that, of those who were cited before me, the majority consider that Spanish law would not apply the doctrine of renvoi, and include in their number the President of the Supreme Court. Basing myself on this material, I come to the conclusion that it would be against the spirit and intendment of the Spanish Civil Code to hold that, in a case such as this, Spanish law would accept the renvoi which the English law makes to it as the lex situs. I therefore hold that, according to Spanish law, the questions raised by this summons as to the devolution of the immovable property in Spain of the testator must be resolved by reference to English law.

I turn, therefore, to the Spanish will. The vital provision is the devise and bequest of the Spanish immovables and movables "unto the person who being of the issue of the late "Most Noble Arthur Duke of Wellington and Ciudad Rodrigo "my great-great-grandfather will on my decease become "Duke of Wellington and Ciudad Rodrigo for his absolute "benefit." I treat this as a devise and bequest in favour of the person who becomes "Duke of Wellington and Duke of Ciudad "Rodrigo," a reading in favour of the present duke. But read even so, this appears to me to be a devise and bequest to the person, if there be one, who shall fulfil both requirements. In other words, it is a gift subject to a double qualification. In my view, there is no room for the application of the maxim falsa demonstratio non nocet. No one person exists who fulfils both qualifications, and therefore the gift fails.

The question then arises whether the Spanish movable and immovable property is disposed of by the English will or is undisposed of.

The English will is described by the testator as "my last "will save as regards the property which is disposed of by my "Spanish will which property so disposed of is not intended to "be disposed of or dealt with by this my will." Apart from this provision, the effect of which I shall have to consider, the will contains language apt and sufficient to dispose of both the Spanish movables and the Spanish immovables. By cl. 3 the testator bequeaths to his trustees: "Thirdly all if any moneys "and other personal or movable property in Spain belonging "to me at my death which does not pass under my Spanish "will"; and by cl. 5 he devises and bequeaths: "all my "property real as well as personal not hereby or by any codicil "hereto otherwise specifically disposed of," in each case for the same person, in the events which have happened the present duke.

The question therefore is what is the effect of the words at the beginning of the English will which I have quoted, read in the light of the rest of the will and in the light of the circumstance that, as I have held, the Spanish will is ineffective to dispose of the Spanish movable and immovable property comprised therein.

It is clear on the authorities that, had the relevant provisions of the Spanish will been incorporated in the English will, the Spanish property would have passed as regards the movable property under cl. 3 and as regards the immovable property under cl. 5 of the English will and would not have been undisposed of. *Green* v. *Dunn* (1); *De Trafford* v. *Tempest* (2); *Blight* v. *Hartnoll* (3), and *In re Mason* (4). To such a state of circumstances the reasoning of Jessel M.R. in *Blight* v. *Hartnoll* (3) would have applied. There would have been a true residue and the Spanish property, ineffectively disposed of by the words "to the person .... who will on my decease "become Duke of Wellington and Ciudad Rodrigo," would pass under cll. 3 and 5 of the English will. Does it make any difference that the opening words of the English will state that the Spanish property is not intended to be dealt with by that will? Is the effect of that provision that there is not a true residuary gift in the English will? I think not. The provision in question states on its face the reason why the testator does not intend to dispose of or deal with the Spanish property by the English will, namely, because in his words it "is disposed of by "my Spanish will." Those words to my mind carry with them the implication that the Spanish property is excluded from the English will solely because the testator had designed to dispose of it by his Spanish will, and therefore that the words "disposed of by my Spanish will" mean "effectively disposed of "by my Spanish will." I do not find in any other part of the English will any language which would indicate a contrary intention. In my judgment, therefore, the Spanish property movable and immovable, which is comprised in, but ineffectually disposed of, by the Spanish will, passes to the present duke under the English will, the movable property under cl. 3 and the immovable property under cll. 5 and 6.

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(1) 20 Beav. 6.

(2) 21 Beav. 564.

(3) 23 Ch. D. 218, 222.

(4) [1901] 1 Ch. 619.

I must now consider the submission, on behalf of the defendant the Dowager Duchess of Wellington, that the English will is ineffectual to pass the immovable property in Spain because by that will it is subjected to certain trusts: that Spanish law does not recognize trusts; that consequently the present duke could not make a title to the Spanish immovable property under the English will; and that, therefore, the Dowager Duchess takes the whole of the Spanish immovables as on an intestacy.

It appears from the expert evidence that, so far as immovable property in Spain is concerned, there is a system of compulsory registration, and that in order to perfect title to immovable property or to any interest therein, such as a usufruct, it is necessary to obtain registration. The experts agree that Spanish law does not recognize the doctrine of trusts as understood in English law, and that it is not possible in Spanish law to obtain registration of a trust. They are also agreed, however that the mere presence in a document of title, including a will, of the word "trust" would not, of itself, be fatal to registration, and that, assuming English law to be applicable in the case in question, the registrar and, if necessary, the Spanish court would seek competent English opinion as to the effect of the document in question. Further, they agree that if the English opinion were that the effect, for instance, of a devise to A. in trust for

B. was to confer on B. an immediate beneficial interest, the document would confer a good title on B., notwithstanding the presence of the word "trust." It further appears that the powers of what corresponds to the executor in Spanish law last only for one year from the death of the deceased; that at the end of that period he becomes functus officio, but that in such a case, where the administration of the estate is not complete, the Spanish court would appoint an administrator.

In this case the testator by cl. 5 of the English will devised and bequeathed his residuary estate "to my trustees upon the "administration trusts contained in Form 8 of the Statutory "Will Forms, 1925." By cl. 6 of the English will the testator provided as follows. [His Lordship read cl. 6 and continued:]

In the events which have happened, namely, the circumstance that the present duke was of the age of twenty-one years at the death of the testator, the effect of cll. 5 and 6 of the English will is that the plaintiffs, as trustees, hold the Spanish immovable property for the testator absolutely, subject to such of the Administration Trusts contained in Form 8 of the Statutory Will Forms, 1925, as, in the circumstances, including the fact that the present duke was of the age of twenty-one years at the death of the testator, are applicable. That is that the trustees hold the Spanish immovable property for the limited purpose of due administration, and subject thereto for the present duke absolutely.

In my judgment, on the true view of the expert evidence, the interposition of the administration trusts before the absolute gift to the present duke does not make the English will ineffectual to pass the Spanish property, and the land registrar in Spain, or, if necessary, the Spanish courts, on reference to them, on being informed of the above circumstances and that administration was complete, would be bound to register or to order registration of the present duke as the absolute owner of the Spanish immovable property.

For these reasons, in my judgment, the present duke is entitled to the Spanish movable and immovable property comprised in but ineffectually disposed of by the Spanish will.

Solicitors: *Farrer & Co.; Theodore Goddard & Co.; E. F. Turner & Sons.*

J. L. D.

Applied and followed. *Re* Blandy-Jenkins (*decd.*). [1948] 1 All E.R. 582.

Followed. *In re* Blandy-Jenkins. [1948] 1 Ch. 322

Approved. Williams *v.* Sharpe. [1949] 2 All E.R. 102.

Referred to. Public Trustee *v.* Manchester Corpn. [1949] Ch 737

Referred to. Williams *v.* Sharpe. [1949] 1 Ch. 595

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DUKE OF LEEDS *v.* DAVENPORT.

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May 14, 15; *June* 19.

Mines and minerals—Compulsory acquisition—Settled Estate including coal mines—Freehold interest in mines acquired by National Coal Board—Compensation assessed and paid to trustees—Apportionment and disposal of compensation among beneficiaries—Values to be separately calculated for each " holding "—Capital payment to tenant for life—Future payments not commutable—Coal Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 52), *ss.* 6, 7, *sch. III, Part* 4, *paras.* 21, 22.

Freehold estates settled by the will of a testator who died in 1927 comprised a number of coal mines in Yorkshire and the North Midlands. By the Coal Act, 1938, these mines were compulsorily acquired by the National Coal Commission, the vesting date being July 1, 1942, and the compensation therefor was duly assessed by the Regional Valuation Boards of each area and paid to the trustees of the will, the net amount in respect of nine separate " holdings," after deducting 869*l.* paid to surface owners, being 194,340*l.* The tenant for life now applied under para 21, sub-para. (2) of Part 4 of the Third Schedule to the Act for the directions of the court as to the proper apportionment, disposal, and investment of the compensation. The trustees of the will the persons contingently entitled to the mines in remainder under the will and the National Coal Board, which superseded the National Coal Commission by virtue of the Coal Industry (Nationalisation) Act, 1946, were made respondents to the application. The tenant for life claimed that the capital supplements payable to him under the Act ought to be commuted and paid to him in one lump sum, and this was not opposed by any other beneficiary.

Held, (1.) that the compensation in respect of each separate holding must be treated as a separate fund in the application of para. 21 of Part 4 of sch. III as to its disposal, and there was no justification for treating the aggregate compensation as a single fund for this purpose;

(2.) That the compensation received in respect of each holding must be treated as a wasting asset with a life corresponding to the estimated life of the holding, and be applied in such manner as to ensure as far as possible that each successive beneficiary should receive a rateable proportion of the estimated royalty income in each year which he would have received from the holding if it had not been sold, the proportion arrived at by a uniform abatement of each year's estimated royalty income being calculated so as to exhaust the entire capital and income of the compensation moneys by the end of the estimated life of the holding;

(3.) That the rate of interest to be adopted for the calculations to be made was three per cent. and the capital supplement for each year must be fixed once for all by reference to that rate of interest;

(4.) That the effect of the proviso to sub-para. 2, of para. 21 of Part IV of sch. III to the Coal Act, 1938 that "no part of "the income of the compensation shall be required or caused "by virtue of this sub-paragraph to be set aside as capital "of the settlement," is to exclude the operation of s. 47 of the Settled Land Act, 1925, so far as income of the compensation moneys is concerned, and that accordingly the whole of the income of the compensation moneys is payable as income to the tenant for life in each year, even though the mines, if not sold, would have produced no income in that year, but that this proviso does not operate to exclude any express or necessarily implied provision for accumulation contained in the settlement itself.

(5.) That accordingly, if under s. 47 of the Settled Land Act, 1925, a proportion of the royalty income derived from the holding in any year, would have been liable to be set aside as capital money under the settlement, the like proportion of the abated royalty equivalent for the same year, must be similarly set aside, but in view of the proviso above mentioned not exceeding the amount, if any, of the capital supplement for that year.

(6.) That in the present case, since the existing mining leases were granted or agreed to be granted by the testator in his lifetime, s. 47 of the Settled Land Act did not operate to require any part of the royalty income derived under such leases to be set aside as capital money under the settlement.

(7.) That the tenant for life was not entitled to be paid an immediate capital sum in commutation and satisfaction of all capital supplements accruing during the rest of his life, that being a benefit differing in kind from any which he could have received under the settlement. Such a payment could only be authorized by way of compromise to be approved by the court.

Askew v. *Woodhead* (1886) 14 Ch. D. 27 and *In re Robinson's Settlement Trusts* [1891] 3 Ch. 129 applied.

ADJOURNED SUMMONS.

The facts, as stated in the reserved judgment were as follows: This is an application under the Coal Acts, 1938 to 1943, for the directions of the court as to the disposal of the compensation moneys received in respect of the compulsory acquisition under the Coal Act, 1938, of the freehold interests in certain coal or mines of coal formerly comprised in the settlement created by the will, dated July 17, 1925, of the tenth Duke of Leeds, who died on May 10, 1927. The will was proved on August 8, 1927, by the first three defendants as the executors therein named, who were also appointed by the will to be trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890, and of any Act amending or consolidating the same. Since the issue of the originating summons the first defendant retired from the trusteeship of the will without the appointment of any new trustee in his place. It was accordingly directed at the hearing that all further proceedings against him should be stayed.

The effect of the settlement created by the will, so far as material for the present purpose, was that, subject to the payment to the testator's widow of a yearly rent charge (which is amply secured without recourse to the compensation moneys in question) and to the payment of a further yearly rent charge to one of his daughters, since deceased, the testator's freehold lands and hereditaments not otherwise disposed of, including the coal or mines of coal in question, were limited (as regards all life estates without impeachment of waste) to the testator's only son, the present plaintiff, who succeeded his father as eleventh Duke, for life, with remainder to the plaintiff's sons successively according to seniority in tail male, with the remainder to the use in tail male of such person, if any, as should at the time of the failure or determination of the preceding limitations be entitled to the title or dignity of the Duke of Leeds, with remainder to the use in fee simple of the person or persons who at the time of the failure or determination of the preceding limitations should answer the description of his own right heir or right heirs; with a provision revoking any estate in tail male limited to a person born in the testator's lifetime and substituting for the estate so revoked a limitation to the use of that person for life, with remainder to his sons successively according to seniority in tail male, with the like remainders over as were thereinbefore limited to take effect after the estate so revoked. The plaintiff, born in the year 1901, was married, but had no issue. In default of male issue of his, the fourth defendant, Sir Francis D'Arcy Godolphin Osborne, born in the year 1884 and unmarried, should he survive the plaintiff, would succeed on the plaintiff's death to the Dukedom of Leeds and consequently become tenant for life under the settlement. In default of male issue of both the plaintiff and Sir Francis, the fifth defendant, Sydney Hugh Godolphin Osborne, born in the year 1887 and also without issue, should he survive them both, would in his turn succeed on the death of the survivor of them to the Dukedom of Leeds, and consequently become tenant for life under the settlement. In default of male issue of the plaintiff and of both these defendants, the limitation in

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favour of the person or persons answering the description of the testator's own right heir or right heirs at the time of the failure or determination of the preceding limitations would take effect. The persons who would answer that description, if such failure took place to-day, would be the testator's daughter, the seventh defendant, Moira Godolphin Lyttelton, and the two surviving children of the testator's daughter, the late Countess of Strathmore, who was originally joined as the sixth defendant, but had since died. Directions were given at the hearing for the substitution of these two grand-children of the testator as defendants in place of their mother. While all persons, therefore beneficially interested under the settlement so far as at present in existence and ascertainable were before the court, interests of possible unborn male issue of the plaintiff or of either of the two presumptive life tenants in remainder were necessarily affected; while the persons who would in fact constitute the class of right heirs of the testator to become absolutely entitled under the ultimate limitation, if it took effect, can only be ascertained by reference to the state of the family at a future date, that is to say, the date of the failure of the preceding limitations of the settlement. The remaining defendant was the National Coal Board, which, under the provisions of the Coal Industry (Nationalisation) Act, 1946, had, since the issue of the originating summons herein, superseded the Coal Commission constituted by the Coal Act, 1938, and had accordingly been substituted for the Coal Commission as a defendant by order to carry on dated February 20, 1947—a substitution now automatically provided for by r. 1 of the Rules of the Supreme Court (No. 2) of 1947. The National Coal Board was concerned only with the question of costs, to be dealt with at a later stage in the judgment. The total amount of the compensation paid to the trustees for the nine holdings comprised in the settlement was 194,340*l.*, details of which are given in the judgment.

Andrew Clark K.C. and *J. V. Nesbitt* for the plaintiff. Prior to the compulsory acquisition of the mines the settlement created by the will of the tenth Duke of Leeds comprised, inter alia, a group of coal mining properties let on mining leases which, for the purpose of acquisition under the Coal Act, 1938, were divided into nine separate holdings. The compensation which has been awarded under the Coal Act, 1938, is based on the probable life of the mines and the estimated income from the mines in each year of that life, and takes into consideration the terms of the different leases and the uncertainty of the estimates in future years. The mines therefore comprised a group of nine wasting assets, the longest life of any of which was not estimated to exceed 150 years. For this group of assets we now have substituted an interest bearing fund, i.e., the compensation moneys, and the question before the court is how that fund should be dealt with by the trustees of the settlement so as to give to the beneficiaries under the settlement the like benefit therefrom as they might lawfully have had from the mines if they had not been sold.

The first step must be to turn the interest bearing fund into a wasting asset with a life equal to the life of the mines, and in so doing, to ensure that each annual payment bears the same proportion to the other annual payments as the estimated revenue from the mines (if unsold) for that year bears to the estimated revenue from the mines in the other years of their estimated life. [They referred to Settled Land Act, 1925, s. 79, and Lands Clauses Act, 1845, s. 74, and the following cases decided thereunder—*In re Phillips' Trusts* (1); *Askew* v. *Woodhead* (2); *In re Hunt's Estate* (3); *In re Robinson* (4); and *In re Fullerton's Will* (5).]

It would, no doubt, be right in principle to take each holding separately and make separate calculations for each holding, but in view of the length and complexity of the calculations involved we have not done this, but have taken the nine holdings as one group and made one calculation covering the estimated revenues as a whole, and treating the compensation moneys as one fund. This is to the disadvantage of the tenant for life, but he is prepared to concede this disadvantage if he can be paid a capital sum immediately to cover once and for all his rights in capital. We have had a table prepared by an actuary which is in evidence and which shows the annual payments in each year commencing July 1, 1942, and continuing for the estimated life of the longest of the holdings which would exactly exhaust the capital of the compensation moneys at the expiration of such period, and calculated so that each annual payment is proportionate to the estimated revenue from the mines in that year if the mines had not been sold. The table is prepared on the basis that interest at

(1) (1868) L. R. 6 Eq. 250.
(2) (1889) 14 Ch. D. 27.
(3) (1884) W. N. 181.
(4) [1891] 3 Ch. 129.
(5) [1906] 2 Ch. 138.

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three per cent. per annum will be received throughout the period on the capital of the compensation moneys for the time being in hand and on the basis that the whole of the income of the compensation moneys is to be paid out in each year as a minimum payment irrespective of what the estimated revenue of the mines in that year would have been. This we say is the effect of the proviso to sub-para. (2) of para. 21 of Part IV of sch. III to the Coal Act, 1938. The table also shows what part (if any) of each annual payment falls to be made out of capital.

Having ascertained the amounts of the annual payments to be substituted for the revenue from the mines in each year it is only necessary to see how the revenue from the mines in each year would have been applied under the terms of the settlement and then to apply the annual payments out of the compensation money and interest in like manner. In this case the mining leases having all been granted or agreed to be granted by the testator in his lifetime, and the tenant for life being unimpeachable for waste, the whole of the annual payments will be payable to the tenant for life during his lifetime—these payments are comprised partly of capital and partly of income, and we submit that the tenant for life should now be paid a lump sum of capital in satisfaction of the capital element of the payments which he would receive during his lifetime discounted by the normal risk rates.

It is admitted that this would be a departure from the normal procedure, but we say the court has jurisdiction under the Coal Act, 1938, to make such an order if it is desirable to do so in order to secure, as nearly as possible, that the tenant for life obtains the like benefit which he would have had if the mines had not been sold. In this case we say it is necessary because the annual payments out of compensation will only be about 50 per cent. of the estimated income from the mines if not sold, and the only way of giving any compensation for such loss is by means of an immediate capital payment. The tenant for life suffers more than the remaindermen because no allowance has been made for the risk rate by which the estimated revenues were discounted for the purpose of arriving at the compensation figure, and which was on an increasing scale as the estimates became more remote. In arriving at the compensation moneys, income tax was deducted, and this can only be compensated for by making a payment which will not be subject to tax. There is a precedent for such an order in *In re Barrington* (1). The usual objection that the effect of such an order is to speculate on the life of the tenant for life does not apply here because the whole transaction is a speculation from start to finish. The estimated life of the mines is a speculation, so is the estimated revenue, so is the risk rate applied to discount it, and so, to some extent, is the figure of three per cent. allowed for interest on the compensation moneys.

The reasonable costs of this application fall to be borne by the Coal Board under the provisions of the Coal Act, 1938, as amended by the Coal Act, 1943, and if and so far as the costs so payable may be less than the solicitor and client costs of the parties, the difference should be paid out of the capital of the compensation moneys.

Victor Coen for the trustees, representing the interest of unborn children.

Neville Gray K.C. and *Lindner* for parties entitled in remainder. We do not desire to criticize the long and complicated calculations made on behalf of the plaintiff, but accept the figures. It has been suggested that a compromise could be entered into and no doubt that would avoid difficulties, but a compromise would give no decision on the true construction of sch. III to the Coal Act and that is wanted for application to other cases.

C. A. J. Bonner for the National Coal Board.

Jopling for other defendants. The court is free to order a capital payment to the plaintiff if he prefers to have it. In this class of property the present income is practically certain, and the plaintiff when the Act came into operation was receiving 11,000*l.* a year. Any speculative element is confined to the interest of the reversioners in the distant future; the mines may work out earlier than was expected, or become more valuable.

[JENKINS J.: So far no counsel has opposed Mr. Andrew Clark's argument, and I should like to hear what can be said against it.]

Clark K.C. replied.

Cur. adv. vult.

June 19. JENKINS J. in a written judgment, after stating the facts and the material clauses of the settlement, proceeded.

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(1) (1886) 33 Ch. D. 523.

The Coal Act, 1938, provides, by s. 1 and sch. I for the constitution, incorporation and procedure of the Coal Commission. Section 2 contains certain general provisions as to the functions of the Commission. Section 3 provides for the acquisition by the Commission of the fee simple in all coal and mines of coal together with ancillary property and rights as therein mentioned, and, so far as material for the present purpose, is in the following terms: "(1) The Commission shall "acquire in accordance with the provisions of this Part of this "Act the fee simple in all coal and mines of coal, together with "such property and rights annexed thereto and such rights to "withdraw support as are hereinafter mentioned, subject to "such servitudes, restrictive covenants and other matters "adversely affecting any of the said coal or mines as are hereinafter mentioned, and subject to the provisions of this Part of "this Act with respect to the retention of interests arising "under coal-mining leases and of certain other interests. "(2.) During the period between the first day of January, 1939 "(in this Act referred to as the 'valuation date') and the first "day of July, 1942 (in this Act referred to as the 'vesting date') "all coal and mines of coal shall be held as if all the existing "owners thereof had, in respect of all their interests therein "other than retained interests and with full capacity so to do, "entered into a contract on the valuation date for the sale "thereof to the Commission, at a price to be ascertained by "valuation, with provision for completion of the contract on "the vesting date. (3.) On the vesting date all coal and mines "of coal as existing at that date shall vest in the Commission "for a title comprising all interests then subsisting in any such "coal or mine other than retained interests. (4.) In this Part "of this Act the expression 'coal' (*a*) means bituminous coal, "cannel coal and anthracite"; then I think that sub-s. 4 (*b*) is not material; and (*c*) is: "except in the case of references "to the making merchantable or disposing of coal, means coal "that is unworked, that is so say, not so severed as to have "become a chattel." Section 4, in conjunction with Part I of sch. II, furnishes, in sub-s. 1 and 2, a more detailed definition of the contents and terms of the notional contract referred to in sub-s. 2 of s. 3, and, in sub-s. 3 and 4, provides for the vesting in the Commission on the vesting date, with any coal or mine of coal, of certain ancillary property and rights as therein mentioned, and for the matters subject to which such vesting is to take effect. Section 5 contains provisions as to retained interests, that is to say, those interests (consisting principally of interests under coal mining leases) which are to be excluded from the compulsory acquisition by the Coal Commission, and has no relevance to the question now before me. Sections 6 and 7 provide for the compensation of existing owners, and it is under those sections, in conjunction with sch. III to the Act and certain rules made pursuant to the provisions of that schedule, that the compensation moneys to which the present proceedings relate were ascertained and paid.

These sections, so far as material for the present purpose, are in the following terms. Section 6 provides: "(1.) The "Commission shall pay, as compensation to existing owners "for the acquisition of their interests, sums ascertained in "accordance with the provisions of this and the next succeeding "section in respect of all coal and mines of coal, of all acquired "property and rights, and of all rights to withdraw support "that are to vest in the Commission under Part II of sch. II "to this Act. (2.) The compensation shall be ascertained "separately in accordance with the next succeeding section in "respect of (*a*) all the said matters in respect of which "compensation is to be payable, with the exception of," and then there is an exception of certain minerals other than coal and an exception of surface servitudes, "which matters are in "this Act referred to as 'principal coal hereditaments'." Then in (*b*) it says that the matters within the exception are "in this Act referred to as 'subsidiary coal hereditaments'." By sub-s. 3: "The aggregate amount of the compensation "payable in respect of all principal coal hereditaments shall "be the sum of 66,450,000*l*. (4.) The Central Valuation Board "established under sch. III to this Act shall prepare and "deposit with the Board of Trade a map showing a division of "the whole of Great Britain into regions (in this Act referred "to as 'valuation regions'), and shall allocate to each "valuation region a part (in this Act referred to as a 'regional "'allocation') of the said sum of 66,450,000*l*., being a part "bearing the same proportion to the whole of that sum as "they may estimate the value of all principal coal heredita- "ments in the region to bear to the value of all principal coal "hereditaments in Great Britain." Then s. 7, sub-s. 1, provides: "The sums to be paid for compensation as aforesaid "shall be ascertained by valuation, in accordance with the "provisions of this section, of the interests, other than retained "interests, that subsist at the valuation date in coal, mines of "coal and acquired property and rights (in this Act referred "to as 'acquired interests'). (2.) The subject of each valuation "shall be a unit (in this Act referred to as 'a holding') "consisting of an acquired interest, or of a group of such "interests, that is under the provisions of sch. III to this "Act to constitute a unit for compensation purposes." Sub-section 3 is procedural and relates to the registration of claims or of holdings. Sub-section 4 provides: "The value of "a holding shall be taken to be the amount which the holding "might have been expected to realize if this Act had not been "passed and the holding had been sold on the valuation date "in the open market by the existing owners thereof, selling as "willing vendors to a willing purchaser, under a contract "providing for completion thereof on the vesting date, so "however that, where a right to withdraw support is to vest "in the Commission with coal or a mine of coal in which "a holding subsisted, it shall be valued as if each of the "existing owners thereof, having power to grant that right "to the purchaser for an interest corresponding to the existing "owner's interest in the coal or mine, had agreed so to grant "it in addition to any acquired rights in which the holding "subsisted. (5.) The said amount shall be ascertained, subject "to the provisions of sch. III to this Act, by the Regional "Valuation Board established under sch. III to this Act, "and where the premises in which a holding subsisted include "subsidiary coal hereditaments, the Regional Valuation Board "shall also ascertain the parts of that amount that are "attributable to principal and to subsidiary coal hereditaments respectively." In sub-s. 6 there is a provision for the certification by the Regional Valuation Board of the amounts ascertained by them under the preceding sub-section in respect of each holding, dividing the amounts between principal and subsidiary coal hereditaments. Then sub-s. 7 provides for payment of the compensation. It says: "There shall be "paid in respect of each holding in any valuation region for "which compensation is payable (*a*) a sum bearing to the "amount certified in respect thereof as attributable to "principal coal hereditaments the same proportion as the "amount of the regional allocation for that valuation region "bears to the aggregate of the amounts so certified in respect "of all such holdings in that valuation region; and (*b*) a sum "equal to any amount certified in respect thereof as "attributable to subsidiary coal hereditaments."

I do not think that there is anything else in the body of the Act to which I need refer, with the exception of some of the definitions contained in s. 44. Sub-section 1 provides: "In this Part of this Act, unless the context otherwise requires, "the following expressions have the meanings hereby assigned "to them respectively, that is to say: 'Acquired interest' "has the meaning assigned to it by sub-s. 1 of s. 7 of this Act; "'Acquired property and rights' has the meaning assigned "to it by sub-s. 1 of s. 4 of this Act; 'Claiming under' shall "be construed, in relation to a person referred to as claiming "under the estate owner in respect of the fee simple, or under "the estate owner in respect of a term of years, in any land, as "referring to any person interested in that land in respect of "(*a*) any equitable interest enforceable against that estate "owner (other than an equitable term of years under a coal-"mining lease or an interest created out of such a term of "years)." Then it says: "'Coal' has the meaning assigned "to it by sub-s. 4 of s. 3 of this Act." Then it says: "'Existing owners' means, in relation to any coal or mine of "coal, all persons who have at the valuation date an acquired "interest therein. 'Interested' shall be construed, in relation "to a person referred to as interested in any coal or mine of "coal, or in any other land, as referring to any person entitled "to, or to exercise, or interested in, or in the exercise of, any "estate, interest, charge or power (including an option or right "of pre-emption, and including a contingent executory or "future interest or a possibility coupled with an interest "whether or not the object of the gift or limitation of such "interest or possibility be ascertained) in, on or over that coal "or mine or that other land, as the case may be, or in, on or "over the rents and profits thereof, otherwise than in respect "only of the benefit of a servitude or restrictive covenant "adversely affecting that coal or mine or that other land, as "the case may be, and 'interest' has a corresponding "meaning." Schedule III is headed "Provisions as to "compensation payable under s. 6 of this Act," and is divided into five Parts, the second and fifth of which have no relevance to the question before me. In conformity with sub-s. 3 of s. 7, the first two paragraphs of Part I prescribe what acquired interests or groups of such interests are to constitute units for compensation purposes, each such unit being under the provisions of the last-mentioned sub-section the subject of a separate valuation and referred to in the Act as "a holding."

These paragraphs, so far as material for the present purpose, are in the following terms. Part I of sch. III is headed "Preliminary" and then the sub-heading is "Units for "compensation purposes." Paragraph 1 says: "Subject "to the provisions of para. 2 of this Schedule, each of the "following acquired interests, or groups of such interests, in "coal, mines of coal, and acquired property and rights, shall "constitute a unit for compensation purposes: (*a*) each "freehold reversion (that is to say, in the case of all the coal "and mines of coal that are on the valuation date comprised "in a coal-mining lease derived immediately out of the fee "simple and in the case of acquired property and rights annexed "to any such coal or mine, the interest therein of the estate "owner in respect of the fee simple in the coal and mines "together with the interests therein of all persons claiming "under him)." Then in sub-para. (*b*) there is a reference to leasehold reversions, which is not material to the present case. Then in sub-para. (*c*) there is a reference to "each freehold "in possession in any valuation region, that is to say, in "the case of all the coal and mines of coal in any valuation "region that are not on the valuation date comprised in any "coal-mining lease, and are in the legal ownership as respects "the fee simple of the same estate owner, and in the case of "acquired property and rights annexed to any such coal or "mine, the interest therein of the estate owner in respect of "the fee simple in the coal and mines together with the "interests therein of all persons claiming under him." Paragraph 2 provides for a modification of the sytem of division into units in particular cases.

The application of these provisions in the present case resulted in the coal hereditaments comprised in the settlement being divided into nine distinct holdings, each of which accordingly became the subject of a separate valuation The remaining paragraphs of Part I of sch. III relate to the constitution and procedure of Valuation Boards and provide for a Central Valuation Board and for a Regional Valuation Board for each Valuation Region. Part III of sch. III deals with valuation and is largely procedural. The general scheme is that (subject to certain requirements as to lodging of claims and so forth) each holding is to be valued by the Regional Valuation Board in which it is situate, with a right for any claimant aggrieved by their valuation to have it reviewed in proceedings before a referee appointed as therein mentioned, and that each Regional Valuation Board when the valuations of all the holdings in its region have been settled is to certify the amounts to the Coal Commission, such certificates, on publication as therein mentioned, becoming in effect conclusive, subject to a limited right of appeal to the High Court. Reference should perhaps be made to paras. 13 and 14, which are in the following terms: "(13.) In the "valuation of a holding regard shall be had to the following "rules, that is to say: (*a*) no allowance shall be made on "account of the compulsory acquisition by the Commission "of the premises in which the holding subsisted; and (*b*) the "state in which the said premises were at the valuation date "shall be taken into consideration; and also to such rules as "may be prescribed for securing uniformity of valuation. "(14.) The Central Valuation Board shall have power to "make, with the approval of the Board of Trade, rules as to "the procedure to be followed in giving effect to the three last "preceding paragraphs and for prescribing anything that is "therein directed to be prescribed, and in those paragraphs "the expression 'prescribed' means prescribed by rules "made under this paragraph: Provided that rules under this "paragraph shall not be made until a draft thereof has been "approved by a resolution passed by each House "of Parliament."

Of the nine holdings to which the present case relates, two were in the North Midland Valuation Region and the remainder were in the Yorkshire Valuation Region. The value of each holding for the purposes of the Act was duly settled and agreed with the appropriate Regional Valuation Board, apparently without any occasion arising for review by a referee under Part III of sch. III. In order to arrive at the value of each holding, it was necessary for the Regional Valuation Board concerned to proceed upon the best estimates that could be formed of (*a*) the period of years from the vesting date, that is, July 1, 1942, during which each holding would have been workable, which may be termed the estimated life of the holding; and (*b*) the royalty income which the holding would have produced during each year of its estimated life, which may be termed the estimated royalty income; and in effect to assess by reference to these estimates the price which a hypothetical purchaser on a sale falling to be completed on the vesting date, that is, July 1, 1942, would have paid for the right to receive in each year during the estimated life of the holding the estimated royalty income for that year. It is obvious that this calculation necessarily involved the deduction of substantial discounts and allowances from the gross figures of estimated royalty income. Charges such as mineral rights duty, miners' welfare levy, and management expenses had to be allowed for in order to arrive at the estimated net return; the hypothetical purchaser's liability for income tax had to be taken into account; the estimated net return for each year had to be suitably discounted by reference to the interval of time between the date of completion and the date at which such return might be expected to come to hand; provision had to be made for a sinking fund for the replacement, over the estimated life of the holding, of the capital laid out by the hypothetical purchaser—express reference is made to this sinking fund provision in r. 1 of the Coal Valuation Procedural Rules, 1942, which is No. 1108 in the Statutory Rules and Orders of that year—and furthermore it had to be recognized, as a factor that would have been taken into account by the hypothetical purchaser, that there was a risk, relatively unimportant during the earlier part of the estimated life of the holding, but increasing with the years, that, owing to technical, geological, industrial or economic causes, the estimated royalty income might never be realized. It is in evidence that, in the course of the valuations, allowance was made for this risk by the deduction from the estimated royalty income of a risk rate of five per cent. for the first twenty years and thereafter on a rising scale.

It is clear from the foregoing considerations that, while the values arrived at simply represented the present values as on the appropriate date of the entire freehold interests comprised in the respective holdings as opposed to aggregations of separate valuations of the successive beneficial interests in the respective holdings under the limitations of the settlement, a dissection of the calculations on which the valuation of each holding was based would show that the proportion of the total value attributable to the estimated royalty income for the period corresponding to the probable duration of the plaintiffs' interests as tenant for life in possession—say, the first twenty-five or thirty years from the vesting date, that is, July 1, 1942—represented a very much higher percentage of that estimated royalty income than the percentage of the estimated royalty income for the residue of the estimated life of the holding represented by the balance of such total value. It is further obvious that the estimates on which the valuations were based necessarily became increasingly speculative and unreliable as they advanced into increasingly remote future periods of time. There are limits to what can be done in the way of forecasting the future working of a mine and the financial results of such future working. The estimated lives of the holdings in the present case range from 68 to 150 years, and an estimate, however carefully prepared, of the coal to be worked and royalty income to be received from a given holding 50 or 100 or 150 years hence must depend upon so many assumptions as to amount to a little more than a guess. A further complication is introduced by the fact that the estimated royalty income from a given holding does not necessarily consist of a constant yearly figure throughout the period of its estimated life. On the contrary, there are or may be very substantial fluctuations, including periods in which, according to the estimate, there would have been no royalty income at all. These fluctuations, I understand, are due to the relation of the working plans or assumed working plans, as regards direction of working, order of working of different seams and so forth, to the respective positions of and areas and seams comprised in the various holdings in lease to the colliery undertaking concerned.

The values placed by the Regional Valuation Boards concerned on the several holdings to which this case relates, and the respective estimated lives of such holdings as accepted by those Boards were as follows. The two in the North Midland Valuation Region were valued at 25,664*l.* and 6,119*l.* respectively, with lives of 150 and 148 years respectively; so that 31,783*l.* was the total valuation for those in the North Midland Valuation Region. The holdings in the Yorkshire Valuation Region were valued as follows. The first of them was valued at 45,000*l.* odd and there was an estimated life of 150 years. The next one was valued at 105,000*l.* odd, with an estimated life of 140 years. The next one was 10,000*l.* odd, with an estimated life of 80 years. The next one was a small one, valued at 281*l.*, with an estimated life of 98 years. The next one was valued at 17,487*l.* with an estimated life of 148 years. Then came one which was not effective at all. The valuation was nil and the life was nil, there being no prospect of working. Finally, there was another small one, valued at 77*l.*, with an estimated life of 68 years. That made a total in the Yorkshire Valuation Region of 179,000*l.* odd, and a total for the two

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regions of 210,842*l*. The proportions allocated to these two regions respectively of the total compensation of 66,450,000*l*. payable under s. 6, sub-s. 3, of the Coal Act, 1938, were less than the respective aggregates of the amounts certified by the two Regional Boards under s. 7, sub-s. 6, in respect of the holdings in their respective regions as attributable to principal coal hereditaments, the deficiency being slightly larger in the case of the North Midland Region than it was in the case of the Yorkshire Region. In the result, the compensation as finally ascertained was approximately 17*s*. 4*d*. in the £ of the values of the two holdings in the former, and 18*s*. 9*d*. in the £ of the values of the six effective holdings in the latter region. I do not think that I need state in respect of each holding the compensation figures as so scaled down, but the aggregate scaled down value which represented the compensation was 195,210*l*. Out of this total, a sum of 869*l*. 3*s*. 11*d*. has been paid or is payable to certain surface owners, thus reducing the aggregate sum of compensation moneys with which I am concerned to 194,340*l*. odd.

I now turn to Part IV of sch. III, which deals with the payment and disposal of compensation. Part IV begins with para. 18, which contains provisions as to the ascertainment of persons entitled, and, so far as material for the present purpose, is in the following terms: " For the purposes of any provision " of this Act under which a payment is to be made at any " date to the person entitled to the compensation for a holding, " that person shall be ascertained as follows: (*a*) if the holding " could at the valuation date have been sold and conveyed to " a purchaser in such manner as to bind or overreach all " acquired interests comprised in the holding (either in the " actual circumstances or if any requisite consent, approval, " request or notice had been received or given) either (i) by, " or by the direction of, a single person in whom the whole " beneficial interest comprised in the holding was vested, " (ii) under the powers conferred by the Settled Land Act, " 1925, or under any additional powers conferred by a settle" ment, or (iii) by trustees for sale, or (iv) by a personal " representative in the exercise of his paramount powers, or " (v) under powers conferred by any other enactment, the " person who could have given a valid discharge for the " purchase money arising on such a sale if paid on the date " in question shall be the person entitled." It is clear from this paragraph that in the circumstances of the present case the proper persons to receive the compensation moneys were the trustees for the purposes of the Settled Land Act, 1925, of the settlement created by the will of the tenth Duke of Leeds. It appears from the evidence that the bulk of the compensation moneys had in fact already been paid to such trustees by the time the present summons was issued, and I understand that the balance has since been similarly paid. It is further in evidence that the moneys so received have been invested so as to yield interest at the rate of three per cent. per annum. Paragraphs 19 and 20 of Part IV contain provisions as to the making of payments on account of compensation moneys to the persons entitled. It is, I think, only necessary for me to refer to sub-paras. 1 and 3 of the former of these two paragraphs. Paragraph 19, sub-para. 1, says: " At any time " before the vesting date, or after that date but before the " relevant certificates have become conclusive under para-" graph 17 of this Schedule, the Commission, if they are " satisfied that the compensation for any holding, or the " aggregate of the compensation for a number of holdings to " which the same person is entitled, will be not less than " a particular amount, may make payment of such sum not " exceeding that amount as they may think fit on account " of the compensation for the holdng or holdings." Then there are some provisoes, with which I need not trouble.

Then comes the material sub-paragraph, sub-para. 3, which says: " A payment on account made under this paragraph " before the vesting date, together with interest thereon for " the period between the date on which the payment is made " and the vesting date at the rate of 3*l.* per cent. per annum " less income tax at the standard rate, shall be treated in " account as a payment on account of the capital of the " compensation made on the vesting date, and the said interest " shall be deemed for the purposes of the Income Tax Acts to " be paid on each anniversary of the date of the payment on " account that occurs before the vesting date and on the " vesting date and accordingly shall be treated as a proper " deduction from income."

Next comes para. 21, which contains provisions as to " the " disposal of compensation as between beneficial interests " and, so far as material for the present purpose, is in the following terms: " (1.) The compensation for a holding when " paid by the Commission to the person entitled to receive it " from them, including any sum paid on account thereof "under paras. 19 or 20 of this Schedule, and the income "thereof, shall, in order to its being applied as compensation "to the persons whose interests are comprised in the holding, "be held and disposed of for the benefit of those persons, or "their personal representatives or assigns, in accordance with "the succeeding provisions of this paragraph.

"(2.) In the case of a holding that consists of or comprises "an estate or other interest subject to a settlement within the "meaning of the Settled Land Act, 1925, or to a trust for sale "the proceeds whereof are subject to a settlement by way of "succession, the trustees of the settlement or any court "having jurisdiction in relation to the execution of the trusts "of the settlement, and in the case of the court on the "application of any beneficiary under the settlement, may "require and cause the compensation, or the part thereof "attributable to that estate or other interest, as the case "may be, to be laid out, invested, accumulated, and paid in "such manner as, in the judgment of the trustees or of the "court, as the case may be, will give to the beneficiaries "under the settlement the like benefit therefrom as they "might lawfully have had from that estate or other interest, "or as near thereto as may be, regard being had to the terms "of the settlement and to all relevant circumstances affecting "the premises in which the holding subsisted, including "(*a*) the terms of any subsisting coal-mining lease and the "operation of any provision therein contained as to under-"gettings, short workings, and other like matters; (*b*) the "period within which coal being worked might have been "expected to be worked out or coal not being worked might "have been expected to come into working and to be worked "out; and (*c*) the extent to which, having regard to those "circumstances, the premises ought to be regarded as "property of a wasting character: Provided that (i) where "a payment on account of the compensation for the holding "has been made under para. 19 of this schedule before the "vesting date, the net income accruing to the trustees before "the vesting date from the investment of the sum paid, up to "an amount sufficient to make good to the capital of the "settlement the interest on that sum brought into account "under para. 19 of this schedule against the capital of the "compensation, shall be set aside as capital of the settlement; "(ii) subject as aforesaid no part of the income of the "compensation shall be required or caused by virtue of this "sub-paragraph to be set aside as capital of the settlement."

I think I can go from there to sub-para. 5, which sets out the authorized range of investments. It says: "Money "representing compensation attributable to an estate or other "interest subject to such a settlement or trust for sale as is "mentioned in sub-para. (2) of this paragraph, or vested in "trustees on or for charitable, ecclesiastical or public trusts "or purposes, may, notwithstanding anything in the relevant "trust instrument, be invested not only as authorized by law "or by the trust instrument but also in or on" a range of investments set out, which is a moderately wide or fairly wide range of investments, including, for example, "the ordinary "or other stock or shares of any company incorporated as "aforesaid"—that is, incorporated in Great Britain—"being "a company which has paid dividends upon its ordinary "capital at the rate of at least four per cent. per annum for "at least the ten years next before the time of investment "(of which fact such a letter as aforesaid shall be sufficient "evidence)"; that is, a letter from a bank as to the interest of the previous years. I need not go into the details of the paragraph, but the range of investments is certainly reasonably wide.

Then sub-para. 6 is: "Subject as aforesaid the compensa-"tion for a holding and the income thereof shall be held and "disposed of in such manner as to confer on the existing "owners whose interests are comprised in the holding, their "personal representatives or assigns, the like benefits so far "as may be, as they would have had from their respective "interests in the premises in which the holding subsisted if "those premises had not been acquired by the Commission."

The question which I have to decide turns mainly upon the true construction and effect of para. 21, sub-para. 2, as to which I have the assistance of a number of authorities upon certain earlier enactments of a similar character. Before referring to these earlier enactments and the decisions upon them, it will be convenient if I express my views on three particular matters which are, I think, peculiar to para 21, sub-para. 2, itself. First of all, it will be noted that, in providing for the disposal of compensation moneys, to which para. 21, sub-para. 2, applies, the court is to have regard "to the terms of the settlement and to all relevant circum-"stances affecting the premises in which the holding subsisted, "including" and then there are set out in sub-paras. (*a*), (*b*) and (*c*) three specific matters, which I need not read again.

Those are matters relevant to the holding. As to the terms of the settlement, those are as summarized at the beginning of this judgment. It will be remembered in particular that all life estates were thereby declared to be without impeachment of waste. It follows from this that, if the holdings had remained subject to the settlement, the proportion required by s. 47 of the Settled Land Act, 1925, to be set aside as capital money of rents received under mining leases granted subsequently to the death of the testator, the tenth Duke, otherwise than pursuant to agreements made in his lifetime, would have been one-fourth of such rents. It was not disputed before me and appears to be well settled that this section has no application to rents received under mining leases granted or agreed to be granted by the testator in his lifetime, the whole of which were and, but for the compulsory acquisition, would, during the residue of the terms of those leases, have continued to be applicable as income arising under the settlement. The evidence before me shows, by reference to the history of the various leases, the dates from which the obligation to capitalize one-fourth of the royalty income under s. 47 commenced or would, but for the compulsory acquisition, have commenced as regards each holding. There was no dispute about this and I think it unnecessary for me to go into the details. So far as the present and the immediate future are concerned, this factor appears to be of relatively small importance, but it is nevertheless a factor which should, in my opinion, be taken into account. As to the relevant circumstances affecting the premises in which the holding subsisted, including the matters specifically mentioned in sub-paras. (*a*), (*b*) and (*c*) of para. 21, sub-para. 2, all parties before me were agreed, and I think it is clear from the evidence, that all such relevant circumstances were sufficiently allowed for in the course of arriving at the estimates accepted by the Regional Valuation Boards of the life of each holding and of the royalty income which each holding would have produced during each year of its estimated life. It will also be remembered that the settlement in the present case comprised nine, or rather eight effective, holdings. The question therefore arises whether the compensation received in respect of each holding should in the application of para 21, sub-para. 2, be treated as a separate fund to be dealt with by reference to the relevant circumstances as regards estimated life and estimated royalty income affecting that particular holding or whether the aggregate amount of compensation received in respect of all the holdings should for this purpose be treated as one entire fund to be dealt with by reference to a combination of the relevant circumstances as regards estimated life and estimated income affecting the holdings individually.

In my judgment, the former is the correct course. In s. 7, and Parts I and III of sch. III, each holding is clearly treated as a separate subject of valuation and compensation, and para. 21 of Part IV of sch. III appears equally clearly to treat the compensation received in respect of any one holding as a separate subject of disposal, I therefore see no justification for treating the aggregate amount of compensation received in respect of several holdings as one fund for the purposes of para. 21, sub-para. 2, merely because the several holdings in question happen to have been comprised in one and the same settlement. In view of the varying lives and fluctuating income of individual holdings, and the provision to which I am about to refer in regard to the disposal of the income of the compensation, it appears that it is in general to the advantage of the tenant for life under a settlement comprising several holdings (and I am told it is substantially to the advantage of the plaintiff in the present case) for the compensation received in respect of each holding to be separately dealt with. It may well be that in some cases the effect on the relative interests of successive beneficiaries of dealing separately with the compensation received in respect of each of several holdings would be insignificant as compared with the additional complication and expense involved in making a separate calculation in relation to each of the several amounts of compensation, instead of a single calculation comprising the aggregate sum. In such cases practical considerations might, no doubt, make it proper to dispense with separate calculations and treat the aggregate amount as one fund. Nevertheless, as indicated above, I regard the former as the strictly correct course.

The last of the three particular matters that I have mentioned concerns the interest on the compensation moneys. It will be noted that, while para. 21, sub-para. 2, provides that the compensation may be required or caused, inter alia, "to be accumulated," provisoes (i.) and (ii.) are to the effect that, except as regards income accruing before the vesting date on a payment on account made before that vesting date, "no part of the income of the compensation shall be

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"required or caused by virtue of this sub-paragraph to be set "aside as capital of the settlement." I take the effect of this to be that, while an accumulation may be directed of any income which, if it had been royalty income from the holding, would have fallen to be accumulated by virtue of an express or implied provision for accumulation under the settlement, the process of converting the successive beneficial interests formerly subsisting in the holding under the settlement into as nearly as may be like beneficial interests in the compensation moneys is not to involve any capitalization of income during a period in which the holding, according to the estimates, would in fact have produced no royalty income, or would have produced royalty income smaller in amount that the income produced by the compensation during the like period. For example, the estimates in relation to a particular holding might show a completely unproductive period for, say, ten years from the vesting date. In such a case, were it not for the proviso to which I have referred, it might well have been held that the proper course under para. 21, sub-para 2, would be to allow the person entitled in possession no benefit at all from the compensation during that period, inasmuch as he would during that period have received nothing from the holding itself if it had not been compulsorily acquired; and in the meantime to accumulate the income so as to increase the fund available to provide as nearly as possible the equivalent of the royalty income which would have been received from the holding in subsequent years. The proviso makes it clear that this is not to be done and that the person entitled in possession is to receive in any event a yearly minimum payment consisting of the income actually produced by the compensation.

The earlier enactments of a similar character, to which the authorities I am about to mention relate, are s. 74 of the Lands Clauses Consolidation Act, 1845, and s. 34, of the Settled Land Act, 1882, now substantially re-enacted by s. 79 of the Settled Land Act, 1925. Section 74 of the Lands Clauses Consolidation Act, 1845, provides, so far as material, that "where any purchase money or compensation . . . . shall "have been paid in respect of any lease for a life or lives or "years . . . . or any estate in lands less than the whole fee "simple thereof or of any reversion dependent on any such "lease or estate, it shall be lawful for the court . . . . to "order that the same shall be laid out, invested, accumulated

" and paid in such manner as the court may consider will give " to the parties interested in such money the same benefit " therefrom as they might lawfully have had from the lease, " estate or reversion in respect of which such money shall " have been paid, or as near thereto as may be." The terms of s. 34 of the Settled Land Act, 1882, so far as material, were as follows: " Where capital money arising under this Act is " purchase money paid in respect of a lease for years, or life, " or years determinable on life, or in respect of any other " estate or interest in land less than the fee simple, or in " respect of a reversion dependent on any such lease, estate or " interest, the trustees of the settlement or the court as the " case may be . . . . may . . . . require and cause the same " to be laid out, invested, accumulated, and paid in such manner " as, in the judgment of the trustees or the court, as the " case may be, will give to the parties interested in that money " the like benefit therefrom as they might lawfully have had " from the lease, estate, interest, or reversion, in respect " whereof the money was paid, or as near thereto as may be." Section 79 of the Settled Land Act, 1925, is in substantially identical terms, but omitting, consequentially upon the other real property legislation of the same year, the references to leases for lives.

As to the authorities, the first to which I would refer is *In re Phillips Trusts* (1). That was a case where settled leaseholds had been compulsorily acquired under the Lands Clauses Consolidation Act, 1845, and, upon an application under s. 74 of that Act, Lord Romilly, M.R., said this: " I think that the proper course will be to refer it to an actuary " to ascertain what ought to be paid every year to the tenant " for life out of capital and income. The fund may be invested " in the names of the trustees, and they must make such " annual payments to the tenant for life as shall be certified " by the actuary to be proper." The next case is *Askew* v. *Woodhead* (2), which was another application under the same section in respect of the proceeds of sale of settled leaseholds compulsorily acquired. I think that I can go straight to the judgments in the Court of Appeal. Jessel M.R. said: " The " question before us is, what is the proper construction of " s. 74 of the Lands Clauses Consolidation Act, 1845. I will " first consider the simple case of a leasehold settled upon " a person for life, with a limitation over on his death to

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(1) L. R. 6 Eq. 250.

(2) 14 Ch. D. 27, 34.

"another person absolutely. When a property so circumstanced is purchased by a company, what mode of dealing "with the purchase money will give the parties interested "the same benefit as nearly as may be as they would have had "from the lease? This result would clearly be attained by "investing the money in the purchase of an annuity having "as many years to run as there were years remaining in the "term, and by paying it to the tenant for life, and after his "death, if the tenant for life dies within the term, then to "the remainderman. Generally an annuity cannot thus be "purchased which will bring in as large an income as the "leasehold, but sometimes it can. The same principle, how"ever, must apply whether the income is more or less. If an "annuity is not actually bought, it must be referred to an "actuary to calculate what yearly sum, if raised out of the "dividends and corpus of the fund, will exhaust the fund in "the number of years which the lease had to run and the "amount so ascertained must be paid to the tenant for life."

Then Brett L.J., about half-way through his very short judgment, on the next page, said this: "The object of the "statute evidently is to substitute the money for the lease, "and give the parties interests in the money corresponding "to their interests in the lease. This can only be done by "converting the money into an annuity which will last as long "as the lease, and by paying the annuity to the person who "would for the time being have been entitled to the possession "of the leasehold. There is nothing in the Act which authorizes "us to say that the tenant for life is only to have the same "income as before." I do not think that there is anything to which I need refer in the judgment of Cotton L.J.

The next case is *In re Hunt's Estate* (1). That was a similar case, except that the application was made by the personal representatives of a deceased tenant for life who had, under a previous order, in fact only received the income of the proceeds of sale of the leaseholds. Kay J. said that "the law "had been settled by the decision in *Askew* v. *Woodhead* (2) "and that he could, notwithstanding the order made on a "former occasion, divide the fund amongst the representatives "and the next of kin upon the principle of that case, and made "an order accordingly." He therefore treated the principle as settled by *Askew* v. *Woodhead* (2).

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(1) (1884) W. N. 181.

(2) 14 Ch. D. 87.

Next there was *In re Barrington* (1). That was an application under the same section by the tenant for life (subject to a mining lease) of settled minerals which had been compulsorily acquired by a railway company. Kay J. held that the whole of the lessor's proportion of the purchase money, amounting to only 136*l.*, should be paid to the tenant for life, on the ground, apparently, that the whole of the minerals in question might reasonably have been expected to have been worked out in the lifetime of the tenant for life. *In re Barrington* (1) was distinguished in *In re Robinson's Settlement Trusts* (2), a case in which it was held that no apportionment could be made under s. 74 of the Lands Clauses Consolidation Act, 1845, of the proceeds of sale of the fee simple interest (not subject to any lease) in settled minerals compulsorily acquired by a railway company. Chitty J. said this: "That "section"—that is s. 74—"does not apply to this case, "because the subject matter of this sale does not come within "the definition of the interests dealt with by that section. "It is not necessary, therefore, that I should make any "observations on the decision in *In re Barrington* (1) beyond "saying that I am satisfied that Kay L.J. did not intend to "depart from the meaning of the words in that section, and "in the case before him he considered that the sum of "136*l.* 0*s.* 2*d.*, being that part of the compensation which "was allotted to the lessor, would fairly represent the value "of the reversion in the minerals which the tenant for life "could have gotten but for the purchase by the railway "company. There are expressions in the judgment which "were laid hold of by Mr. Butcher to show that the learned "judge took a different view, but, in my opinion, the argument "that was founded on these expressions cannot be maintained. "If any apportionment had to be made, the right mode of "ascertaining the amount of compensation payable to the "tenant for life would be to ascertain the number of years "within which the minerals could be worked out. Say, for "instance, twenty years; then to divide the compensation "money into twenty parts, and give the tenant for life one "of such parts every year. That mode of payment would "exactly correspond with his rights in the minerals if the "railway company had not intervened; but, as I have already "said, s. 74 does not, in my opinion, apply to this case."

(1) 33 Ch. D. 523.

(2) [1891] 3 Ch. 129, 132.

Then there was *In re Fullerton's Will* (1), where settled minerals, subject to mining leases, had been compulsorily acquired under a waterworks Act, which incorporated the provisions of the Lands Clauses Consolidation Act, 1845. Swinfen Eady J., as he then was, followed *In re Robinson's Settlement Trusts* (2) and declined to follow *In re Barrington* (3). At page 141 of the report he said this: "It is then urged "that, if the lessees are not entitled to the money in "their own right, it has at all events been made over to them "by the life tenant, who is entitled to it under *In re* "*Barrington* (3), seeing that the coal would probably have "been worked out in his life; but the true principle of "apportionment between life tenant and remainderman in "these cases is that stated by Chitty J. in *In re Robinson's* "*Settlement Trustees* (4). He says: 'If any apportionment "'had to be made, the right mode of ascertaining the amount "'of compensation payable to the tenant for life would be, "'to ascertain the number of years within which the minerals "'could be worked out. Say, for instance, twenty years'" and he reads the rest of the passage, which I have already quoted, from Chitty J.'s judgment. In view of these two later cases, I can only regard the decision in *In re Barrington* (3) as confined to the special circumstances of that particular case and not as laying down any general principle. Finally, in *In re Simpson* (5), there was an application by a tenant for life under s. 74 of the Settled Land Act, 1882, in respect of the proceeds of sale of a leasehold house which she had sold under her Settled Land Act powers. Swinfen Eady J. as he then was, said this: "The widow, who sold the lease as equitable life "tenant under the Settled Land Act, 1882, contends that "under s. 34 she is entitled to have the purchase money applied "in such manner as will give her the like benefit as she might "lawfully have had from the lease. This has now eleven years "to run and, if the widow had remained in possession till it "ran out, she would have obtained the full benefit. As she is "entitled to the like benefit under s. 34, she must be paid "during her widowhood such an annuity as will exhaust the "proceeds of sale, capital and income, in eleven years. If she "outlives that term without remarrying, she will obtain all. "Otherwise she will obtain a proportion during her widowhood,

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(1) [1906] 2 Ch. 138.

(2) [1891] 3 Ch. 129, 132.

(3) 33 Ch. D. 523.

(4) [1891] 3 Ch. 129.

(5) [1913] 1 Ch. 277, 282.

" and the residuary legatees will take what remains. This is " the basis adopted in *Askew* v. *Woodhead* (1) and it is not " disputed."

Consideration of para. 21, sub-para. 2, in the light of these authorities leads me to conclude that the compensation received in respect of a given holding must be treated as a wasting asset with a life corresponding to the estimated life of the holding, and that, subject to the special direction against capitalization of income, to which I have already referred, the capital and income of such compensation must be applied in such manner as to ensure, so far as possible, that each successive beneficiary receives year by year during the continuance of his interest a rateable proportion of the estimated royalty income which he would have received from the holding during the like period, the proportion, arrived at by a uniform abatement of each year's estimated royalty income throughout the estimated life of the holding, being so calculated as to exhaust the entire capital and income by the end of the estimated life of the holding. More specifically, I think that the requirements of para. 21, sub-para. 2, will be satisfied by the following procedure. (i.) Take the estimated life of the holding (as accepted by the Valuation Board concerned) as the period during which the capital and income of the compensation received in respect of the holding must be completely consumed. (ii.) Assume that the holding would have produced, during each year of its estimated life, the estimated royalty income, if any, for that year (as accepted by the Valuation Board concerned). (iii.) Estimate the yearly rate of interest which the compensation, or the balance of it from time to time remaining in hand, can be reasonably expected to produce during the period represented by the estimated life of the holding, and assume for the purposes of calculation that the rate of interest so estimated (which I will term " the conventional rate ") will be uniformly maintained throughout that period. (iv.) Calculate what abatement, uniformly applied to the estimated royalty income for every year, must be made in the estimated royalty income for each year in order to ensure that the capital and income of the compensation will exactly suffice to provide for the payment in each year of the appropriate abated amount (which I will term " the abated royalty equivalent ") to the person for the time being entitled in possession under the settlement during the

(1) 14 Ch. D. 27.

whole of the period represented by the estimated life of the holding, and will, by means of such payments, be completely exhausted by the end of that period, on the footing that (*a*) there will be no appreciation or depreciation in the value of the investments representing the compensation ; (*b*) the compensation will produce uniformly throughout the period no less and no more than the conventional rate of interest ; and (*c*) the person for the time being entitled in possession is to receive in respect of each year the income of the compensation for that year or the abated royalty equivalent, whichever is the greater, and the excess, if any, of the abated royalty equivalent for any year over the income of the compensation for that year (which I will term " the capital supplement ") is to be provided out of capital. (v.) The compensation having been duly invested within the range of investments authorized by para. 21, sub-para. 5, pay the person for the time being entitled in possession the resulting income, together with the capital supplement, if any, for each year, and continue this process until the compensation is exhausted or the balance of it becomes vested in possession in some person or persons absolutely entitled under the settlement, whichever event first happens. In the present case it will obviously be the latter. For the purposes of apportionment on the death of a tenant for life, the capital supplement attributable to any year should, I think, be treated as accruing from day to day during that year. (vi.) If a proportion of the royalty income derived from the holding in any year, had it remained subject to the settlement instead of being compulsorily acquired, would, in view of s. 47 of the Settled Land Act, 1925, have been liable to be set aside as capital money arising under the settlement, the like proportion (in this case one-fourth) of the abated royalty equivalent for the same year must be similarly set aside, but, in view of the prohibition against the capitalization of income contained in the proviso to para. 21, sub-para. 2 (which I regard as exempting the income of the compensation from accumulation except in so far as there may be an obligation to accumulate by virtue of the actual limitations of the settlement itself in any particular case), not exceeding the amount, if any, of the capital supplement for that year. Any amounts so set aside and the future income thereof will thenceforth cease to be subject to the special provisions applicable to the capital and income respectively of the compensation.

There is in evidence a calculation on the lines indicated in (iv.) above (but treating the aggregate amount of compensation received in respect of all the holdings as one entire fund) which has been made by an actuary for the purposes of the present case. I am told, and can well believe, that this calculation is a matter of considerable complication and difficulty. If similar calculations are made separately in relation to the compensation received in respect of each of the eight effective holdings, the amount of work involved will be correspondingly multiplied; but the plaintiff claims that this would be substantially to his advantage as tenant for life in possession and, as already indicated, I regard it as the strictly correct course, though, as a practical matter, some other method must obviously be devised of dealing with the two small sums of 263*l.* and 72*l.* received as compensation for two of the holdings. The conventional rate of interest adopted by the actuary for the purposes of his calculation is three per cent. and all parties represented before me accepted this as the appropriate rate to take, particularly having regard to the fact that the compensation as at present invested is producing that rate of interest. I agree, both on this account and because it seems to me that under present conditions three per cent. and no more is a fair estimate of the yield obtainable over any considerable period of time of a fund invested with due regard for security of capital, even if full use is made of the reasonably wide field of authorized investments set out in para. 21, sub-para. 5.

It is, however, obvious that the validity of the calculation may be seriously affected by any deviation from the conventional rate of interest experienced in actual practice. If the capital supplement were to consist of the excess, if any, of the abated royalty equivalent for each year over the actual income for that year, the tenant for life would be underpaid if the actual income exceeded the conventional rate of interest and overpaid if the actual income fell short of the conventional rate of interest. Accordingly, I think that the capital supplement, if any, for each year must be fixed once and for all by reference to the conventional rate of interest. Thus, if the income actually earned is in excess of the conventional rate, the tenant for life will nevertheless receive, in addition to the actual income, the full amount of the capital supplement computed as if the income had been at the conventional rate only. Conversely, if the income actually earned is less than

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the conventional rate, the tenant for life will nevertheless receive by way of addition to the actual income no more than the amount of the capital supplement computed as if the conventional rate of interest had in fact been realized. I appreciate that this involves a slight departure from the theoretical perfection of the calculation as between tenant for life and remaindermen; but the calculation itself is only right if the actual rate of interest precisely accords with the conventional rate. There remains the possibility of appreciation or depreciation in the investments representing the compensation. I can suggest no feasible method of providing for this and therefore think it must be accepted that the person or persons ultimately entitled must take their chance of gain or loss on this account according to the event. In any case, it may be said that this element of uncertainty is as nothing compared with the uncertainties in which the estimates concerning the life and productivity of the various holdings are inevitably involved.

I have now stated, I trust intelligibly, what appears to me to be a method—I do not say the only possible method—of giving effect to the requirements of para. 21, sub-para. 2, and I think the method which I have stated substantially accords with the submissions made to me at the hearing. The arrangements I have indicated must be treated as taking effect as from the vesting date, that is to say, July 1, 1942, and the plaintiff as tenant for life in possession is accordingly entitled to immediate payment of the interest and income allowed on or earned by the compensation since that date, together with the amount of such capital supplements as have accrued due since that date.

I was asked to go further and, having, as it were, quantified the plaintiff's interest substantially as indicated, to direct an immediate payment to him out of the capital of the compensation, in commutation and satisfaction of all capital supplements accruing during the residue of his life; and it was strenuously contended that this course was authorized, if not enjoined, by para. 21, sub-para. (2.) The arguments advanced in support of this contention were, I think, substantially to the effect (*a*) that the proportion of the valuation, and consequently of the compensation, attributable to the earlier years in the estimated life of each holding, and in particular the years falling within the probable duration of the plaintiff's interest, was relatively far higher than the proportion attributable to the later years. I think that this is clearly so, as will be seen from what I have already said about the method of valuation. (*b*) That the increasing risk of failure to realize the estimated royalty income in the later as compared with the earlier years, recognized in the valuations, is not reflected in the method of disposal of the compensation stated above. (*c*) That, inasmuch as the valuations allowed for income tax on the estimated royalty income, and the plaintiff will be liable for tax on the abated royalty equivalent, the result of the method of disposal stated above will in effect be to make his interest suffer a twofold diminution on account of tax. (*d*) That the plaintiff could have sold his life interest in the holdings at a price substantially in excess of the value of what he will get from the compensation moneys under the method of disposal stated above, while the proportion of the compensation moneys which, according to this method, will go to the persons ultimately becoming entitled to the absolute interest in remainder will be disproportionately large, both in relation to the provision made for the plaintiff and in relation to the present value of their future interest in this speculative asset.

I cannot regard these arguments as supporting the conclusion contended for. The subject matter as regards each holding of the compulsory acquisition was, I think, quite clearly the entire freehold interest constituting the holding, and the valuation was made and the compensation paid simply in respect of that absolute interest. That being so, I think the steps taken in arriving at the value—the discounting of the estimated royalty income more heavily in later than in earlier years, the allowance for tax, the increasing scale of risk allowance and so on—are wholly immaterial for the purposes of para. 21, sub-para. (2.). Different considerations would no doubt apply if the transaction had involved the separate acquisition for separate sums of compensation of the plaintiff's life interest in possession, on the one hand, and the interests in remainder, on the other ; but that was not the case. The compensation, however arrived at and whatever its amount, must, in my judgment, simply be regarded as representing and as substituted for the freehold interest constituting the holding formerly subject to the settlement. Now the compensation thus substituted is required by para. 21, sub-para. (2.) to be dealt with so as to " give to the beneficiaries under " the settlement the like benefit therefrom as they might

" lawfully have had " from the freehold interest in the holding formerly subject to the settlement " or as near thereto as " may be." This I take to mean, first, that the benefits which the successive beneficiaries would have received from the holding must be estimated on the footing that, apart from the compulsory acquisition, the holding would have remained subject to the settlement and the royalty income would have been applied in accordance with the limitations of the settlement; and, secondly, that the compensation must be applied in providing those beneficiaries with successive interests of as nearly as may be like character and amount.

This seems to me to point quite clearly to disposal on the lines I have indicated and definitely to rule out the proposal I am now considering, as giving the plaintiff a benefit radically differing in kind from any benefit which he could lawfully have received from the holding as tenant for life under the settlement. The fact that, apart from the compulsory acquisition, he could have sold his life interest in the holding for a substantially larger sum than is represented by his interest in the compensation under the method of disposal I have indicated seems to me wholly irrelevant. The proceeds of such a sale would have been a benefit derived from the purchaser and not under the settlement. Moreover, the persons ultimately entitled in remainder under the settlement would still have been left with the full benefit of the absolute interest in the holding upon its falling into possession so far as then remaining unrevoked. It is, of course, still open to the plaintiff to sell, if so minded, his abated life interest, if I may so describe it, in the compensation. I fully appreciate that such abated life interest, whether he retains or sells it, is of substantially less value to him than the interest he previously had in the holding under the limitations of the settlement; but I do not see how he can be given anything more, consistently with giving due effect to the interests of the persons interested in remainder; nor do I see how para. 21, sub-para. 2, can be construed as authorizing the commutation, by means of an immediate capital payment, of his prospective right to the capital supplements accruing during his life by way of solatium for the fact that his abated life interest is of substantially less value than the interest which it replaces.

In view of the unanamity of all parties in supporting the plaintiff's contention, I suggested the possibility of authorizing the proposed commutation by way of compromise, if it could truly be shown to be for the benefit of all infant or unborn or unascertained persons interested or possibly interested under the settlement. It appeared, however, that this suggestion was not acceptable, and I was asked to decide the point one way or the other as a matter of construction of the Coal Act, 1938, and in particular para. 21, sub-para 2. This I have accordingly done. My decision against the plaintiff's contention as a matter of legal right does not, of course, rule out the possibility of giving effect to it as a compromise or arrangement if shown to the satisfaction of the court to fulfil the condition mentioned above. Mr. Clark, for the plaintiff, offered certain attractions. He said that, if the commutation were authorized, the plaintiff would be prepared to waive the separate treatment of the compensation received in respect of each holding, which would have entitled him to a substantially larger amount, and would accept some 300*l.* less than the figure actuarially calculated as representing the value, according to the combined calculation of the whole of his rights accrued and prospective against the capital of the compensation. The actuary's figure was 5,780*l.*, of which I think 2,300*l.* represented prospective and 3,480*l.* accrued rights. The plaintiff, it was said, would accept 5,500*l.* in full satisfaction on both accounts. The advantages thus offered are, however, relevant only to compromise and not to construction. It is, of course, clear, as I have already mentioned, that the plaintiff is in any event entitled to the accrued payments as a matter of right.

There remains the question of costs. Paragraph 22, sub-para. 1, of Part IV of sch. III to the Coal Act, 1938, as amended by the Coal Act, 1943, provides: "Subject to the "provisions of this paragraph and of s. 39 of this Act, the "Commission"—now the National Coal Board—"shall pay "the costs reasonably incurred by any person," and then after two cases which do not occur, "(*c*) in a case in which "the compensation is paid otherwise than as aforesaid, in "connexion with any application to the court that may be "requisite for the purpose of determining the manner in which "the compensation ought to be held and disposed of." Mr. Bonner, on behalf of the National Coal Board, agreed that this provision was applicable to the costs of the present proceedings. Accordingly, the costs of all parties other than the National Coal Board reasonably incurred in connexion with these proceedings will be taxed and paid by the National

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Coal Board, and any costs of any party other than the National Coal, so far as not payable by the National Coal Board as aforesaid, will be taxed as between solicitor and client and paid out of the compensation.

I was asked to give a special direction as to the inclusion in the costs, forming the subject of the second above-mentioned taxation, of the costs of all expert advice obtained in relation to the matters in question, whether or not ultimately used, and in view of the complication and difficulty of the calculations involved, I think that this is a direction which I can properly give.

Solicitors: *Lowe & Co., Solicitor, National Coal Board.*

H. L. L.

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May 16; *June* 19.

In re LUCAS, DECEASED.

BETHUNE *v.* LUCAS.

Mines and minerals—Devised by will on trust for sale—Compulsory acquisition—Disposal of compensation received—Apportionment of capital and income—Method of calculation—Rate of interest adopted—Coal Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 52), *ss.* 6, 7, *sch. III, Part* 4, *paras.* 21, 22.

Estates settled by the will of a testator who died in 1911 comprised several coal mines, subject to a statutory trust for sale. The mines which were grouped into five holdings were vested in the National Coal Commission on July 1, 1942, and the trustees applied for the directions of the court as to the disposal and apportionment of the compensation which they had received therefor. Under the will some shares in the estates were now absolutely vested in possession, others were settled upon persons in succession:—

Held, that after deduction of a sum payable to the estate of a deceased beneficiary two-sevenths of the net compensation was payable to four persons in equal shares as being absolutely entitled, and that the remaining five-sevenths must be invested in securities authorized by para. 21 of Part 4 of the third schedule to the Act, and the capital with all interest earned since the vesting date July 1, 1942, must be dealt with in accordance with the principles stated in *In re Duke of Leeds* (ante p. 525), the resulting annual profit of income and capital supplement being payable to the tenants for life of settled shares. The alternative simpler methods of calculation which were contended for must be rejected as being unduly favourable to the tenants for life. The rate of interest to be adopted in these calculations must be three per cent.

ADJOURNED SUMMONS.

This was an application under the Coal Acts, 1938 to 1943, for the directions of the court as to the disposal of the compensation received in respect of certain holdings comprised in a settlement, under the will, dated in the year 1902 and proved in 1911, of Bernard Lucas, who died on April 28, 1911.

The plaintiffs were the present trustees of the will and of the statutory trust for sale through the medium of which its beneficial provisions, so far as land is concerned, took effect. The plaintiffs, other than the public trustee, were also the ad hoc trustees appointed by the Coal Commission, under para. 18 (*c*) of Part IV of sch. III to the Coal Act, 1938, to receive the compensation payable in respect of the holdings in question.

Under the will (1.) A two-sevenths share was held in trust for the defendants, Ellen Daphne Lucas, Doris Irene Lucas, Francis Lucas and Philip Aylwin Lucas, the four children of the testator's deceased son, Wilfrid George Lucas (who died on March 9, 1931), all of whom had attained the age of twenty-one years, in equal shares absolutely. (2.) A two-sevenths share was held in trust for the infant defendant, Margaret Louisa Lucas, the only child of the testator's deceased son, Bernard Chaytor Lucas (who died on June 30, 1944) contingently upon her attaining the age of twenty-one or marrying under that age. (3.) A one-seventh share was held in trust for the testator's daughter, the defendant, Madeleine Louisa Lucas (a spinster) for life, with accruer after her death to the other shares in the event of her having no child who attained a vested interest. (4.) A one-seventh share was held in trust for the testator's daughter, the plaintiff, Marguerite Marie Monica Louise Bethune (who had no issue) for life, with accruer as above after her death. (5.) The remaining one-seventh share was held in trust for the testator's daughter, the defendant, Monica Mary Clare Gully, for life, with remainder to her children to attain the age of twenty-one years or, being daughters, marry under that age, in equal shares absolutely. She had three children, of whom the first died in infancy, the second was the defendant, Elizabeth Mary Gully, who had attained the age of twenty-one years, and the third, Bernard Henry Gully, died

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intestate on October 7, 1932, after attaining the age of twenty-one years. The defendant, Percy Gully was his personal representative.

The will contained a direction for the accumulation of all rents and royalties to be received from the letting of minerals during the longest of certain specified periods from the death of the testator, and by an order, dated February 5, 1934, made by Crossman J. in proceedings shortly entitled "*Re* "*Lucas; Hughes—Hallett* v. *Lloyds Bank Limited*, 1933 "L No. 1006," it was declared that such direction was void as from April 28, 1932, being twenty-one years from the death of the testator, and that the mineral rents and royalties thereby directed to be accumulated and the income of the fund representing the accumulations should be paid to the tenants for life of the settled shares.

G. D. Johnston for the plaintiffs, a tenant for life and trustees. This case is similar to the previous two cases, *In re Duke of Leeds* (1), and *In re Locker-Lampson's Settlement* (2), except that the mines passing under this will are not settled land, but are held under a statutory trust for sale.

E. M. Winterbotham for defendant tenants for life. In this case it has been estimated that the mines will have been worked out by the year 1999. The problem is to ascertain what proportion of the total present value of the probable payments of royalty income the compensation money amounts to, and then abate those payments. The abatement depends primarily on the rate of interest. The annual sum payable is partly capital and partly income, and must be calculated so as to exhaust the compensation money by the date when the mines will have been worked out. I submit that the proper rate of interest is 4 per cent. per annum, though that is more than can be obtained from Government securities. But the trustees are not limited under para. 21 of Part IV of the third schedule to strictly trustee investments. The rate of 4 per cent. is the usual Chancery practice in cases relating to capital and income. *In re Parry* (3).

J. A. Wolfe for grandchildren of the testator. The four children of the testator's deceased son, Wilfrid George Lucas, who died in 1931, are entitled to be paid two-sevenths of the compensation at once in equal shares. As to the other shares

(1) Ante p. 525.
(2) Unreported.
(3) Ante, p. 23.

it is desired to arrive at a simple formula which can be applied without the necessity of obtaining calculations from actuaries. If a tenant for life wants a capital payment it must be based on his expectation of life. He should receive a sum based on the proportion of the compensation money to the total expected yield of the royalties, as regards his particular share. Those are purely mathematical facts which do not require proof in evidence. The proposed formula can readily be embodied in an affidavit.

Ungoed-Thomas K.C. for the defendant, Margaret Lucas, adopted these arguments.

C. A. J. Bonner for the National Coal Board.

Cur. adv. vult.

June 19. JENKINS J. (in a written judgment, after stating the facts as to the settlement). In view of the judgments already delivered in the two previous cases, I can deal with the present case quite shortly.

The holdings in question in the present case are five in number, the valuation compensation payable at 17*s.* 4*d.* in the pound and estimated life in each case being as follows. There were five holdings. The large one was 12,963*l.* valuation, scaled down to 11,221*l.* odd for compensation, and that will expire in 1999. The next one was 145*l.*, reduced to 125*l.* odd for the purposes of compensation, and that expired in 1943. The third one was 447*l.*, reduced to 386*l.* odd for the purposes of compensation, and that expires in 2010. The fourth one was 1,129*l.*, reduced to 977*l.* odd for the purposes of compensation, and that expires in 1968. The last one was 1,790*l.* reduced to 1,549*l.* odd, for the purposes of compensation, and that expires in 1997. That makes a total compensation of 14,260*l.* odd. The amount received by the ad hoc trustees in respect of the compensation is stated in evidence to be 14,774*l.* 12*s.* 8*d.*, and I assume that the difference represents interest allowed in respect of the period from the vesting date, July 1, 1942, until payment.

As to the disposal of this amount, it seems to me, in the first place, that (*a*) the sum of 125*l.* 10*s.* 4*d.* received in respect of one of the holdings, which is wholly attributable to a period prior to the death on June 30, 1944, of the testator's son, Bernard Chaytor Lucas, and (*b*) all interest and income allowed on or earned by that sum during the period from the vesting

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date down to the date of the next mentioned division, must be immediately divided into sevenths and paid, as to two-sevenths to the four children of the testator's deceased son, Wilfrid George Lucas in equal shares, as to a further two-sevenths to the legal personal representatives of Bernard Chaytor Lucas, as to one-seventh to the defendant, Madeleine Louisa Lucas, as to one-seventh to the plaintiff, and as to the remaining one-seventh to the defendant, Monica Mary Clare Gully. Next, two-sevenths of the remaining compensation, together with all interest and income earned or allowed thereon since the vesting date, must be paid to the four children of Wilfrid George Lucas in equal shares. Finally, the balance, that is, five-sevenths, of the remaining compensation must be invested, so far as this has not already been done, in investments authorized by para. 21, sub-para. 5, of part IV of the third schedule to the Act, and the capital of such five-sevenths, together with all interest and income allowed or earned thereon since the vesting date, must be dealt with substantially in accordance with the principles stated in *In re Duke of Leeds* (1) and followed in the case of *In re Lampson's Settlement* (2), the resulting annual product, in the form of such interest and income, plus the appropriate capital supplement, if any, being distributed as from the vesting date in the next-mentioned proportions amongst the persons for the time being entitled to the income of the two-sevenths settled share of Bernard Chaytor Lucas and the respective one-seventh settled shares of the plaintiff and the defendants, Madeleine Louisa Lucas and Monica Mary Clare Gully. This means that the estate of Bernard Chaytor Lucas will receive the proportion of such product attributable to his settled two-sevenths in respect of the two years from the vesting date (July 1, 1942) down to the date of his death (June 30, 1944), and that, as from the latter date, such proportion will have to be accumulated pending the attainment of the age of twenty-one years or previous death of the infant defendant, Margaret Louisa Lucas, except in so far as it may be applicable for her maintenance or benefit under any relevant power.

I do not think it necessary to repeat in this judgment the method approved in the *Duke of Leeds* (1) case and in the case of *In re Lampson's Settlement* (2) of calculating the amount (if any) by which the income of the compensation is to be supplemented out of capital in each year. That is, in my view,

(1) Ante, p. 525. (2) Unreported.

a method, though not necessarily the only method, of giving effect to the requirements of para. 21, sub-para. 2, of part IV of the third schedule to the Act. Mr. Winterbotham and Mr. Wolfe deprecated its adoption in the present case as involving unnecessary complication and expense, and, at the hearing, they each propounded an alternative method claimed to be far simpler to work out, while producing an equally satisfactory result. At my request, they prepared and supplied me with a memorandum illustrating by reference to hypothetical figures and periods, the results of the application of their respective formulæ, and I am much indebted to them for this assistance. Mr. Winterbotham's plan, as I understand it, is to ascertain the present value, as on the vesting date, of the estimated royalty income during each year of the estimated life of the holding, such present value being taken in each case as the sum which, if accumulated at a given rate of simple interest—he said 4 per cent. rather than 3 per cent.—would produce on the due date the amount of the estimated royalty income for the year in question, and to pay to the person for the time being entitled in possession during each year of the estimated life of the holding a sum, provided by the income supplemented as necessary out of capital, bearing the same proportion to the estimated royalty income as the amount of the compensation bears to the aggregate present value of the estimated royalty income for all years ascertained as above. I am not satisfied, though I am open to conviction, that this formula necessarily produces the right result. In particular, bearing in mind the right of the person for the time being entitled in possession to receive the whole of the income accrued by the compensation, even in years wholly unproductive in terms of estimated income, it seems to me that the effect of fixing the proportion by reference to the present value of each year's estimated royalty income, on the basis of accumulation at the assumed rate of interest throughout the period from the vesting date to the year in question, might be unduly favourable to the tenant for life, in as much as the compensation would not be similarly accumulating for the purpose of meeting the proportion so fixed. As regards the rate of interest to be assumed, I think that it should be 3 per cent. rather than 4 per cent.

Mr. Winterbotham pointed out, and I agree, that 4 per cent. is still the rate applied by the court for the purpose of adjusting rights, for example, under the rule in *Howe* v. *Lord Dart-*

mouth, and he cited the recent case of *In re Parry* (1) where that rate was applied. It seems to me, however, that the problem here confronting the court is more nearly analogous to the question which arises in cases under the Inheritance (Family Provision) Act, 1938, in regard to the estimation of the annual income of the net estate, which is defined by s. 5, as "the income that the net estate might be expected at the date "of the order, when realized, to yield in a year." The practice in such cases has, I think, generally been to assume a yield of 3 per cent. rather than 4 per cent. on the realized value of the net estate, and, I think, that for the present purpose also the more conservative estimate is to be preferred.

Mr. Wolfe's calculation is attractively simple. His suggestion is that the tenant for life should receive the whole income, plus a yearly payment out of capital bearing the same proportion to the estimated royalty income for the year as the amount of the compensation bears to the aggregate amount of the estimated royalty income for the whole period of the estimated life of the holding. This formula seems to me to be open to objection as unduly favourable to the tenant for life, since the income produced by the compensation fund which, on this basis, is left entirely out of account, must obviously become progressively smaller as the capital of the fund is consumed. Possibly some form of adjustment to meet this objection might be devised, but it does seem to me to be an objection of some substance to Mr. Wolfe's formula as it now stands. Accordingly, I am not prepared to accept either of the formulæ proposed by Mr. Winterbotham and Mr. Wolfe, unless I can be satisfied by evidence, showing the results which would be produced by its application to the actual periods and figures involved in this case, that those results would give substantial effect to the requirements of para. 21, sub-para. 2, according to the construction which I have placed upon that paragraph in the *Duke of Leeds'* case (2). Therefore, any order made to-day can only be upon the basis that the calculation approved in the *Duke of Leeds'* case (2) and the case of *Lampson's Settlement* (3) will be adopted. The alternative will be to stand the matter over with a view to further examination of the other methods of calculation suggested, with liberty to apply to restore, and I am prepared to take that course, if desired. The order as to costs will be the same as in the two previous cases, Mr. Bonner on behalf of the National Coal Board having so agreed in this case also.

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(1) Ante, p. 23.

(2) Ante, p. 525.

(3) Unreported.

Solicitors: *Ridsdale & Co., for Shipton, Hallewell & Co., Chesterfield; Ponsford & Devenish; C. R. Enever, Freeman & Co.; Farrer & Co.; Solicitor, National Coal Board.*

H. L. L.

In re TABRISKY.
Ex parte THE BOARD OF TRADE.

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June 18.

Lord Greene M.R., Cohen and Asquith L.JJ.

Bankruptcy—Discharge—Case within proviso to s. 26*—Order suspending discharge coupled with condition as to future earnings—Validity—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 26, *sub-s.* 2, *as amended by Bankruptcy (Amendment) Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 7), *s.* 1, *sub-s.* 1.

On an application by a bankrupt for his discharge, if facts are proved which bring the case within the proviso to s. 26, sub-s. 2, of the Bankruptcy Act, 1914, the court must make an order including one or other of the four alternatives mentioned in the proviso, but may in addition include any other conditions which it could impose under the general words of the sub-section, in cases not falling within the proviso.

In re Dallmeyer (1906) 22 T. L. R. 245 followed.

APPEAL from Mr. Registrar Parton.

Two debtors, Abraham Tabrisky and his sister Mrs. Feldman, were adjudged bankrupt on June 25, 1930. On their application for discharge no felonies or misdemeanors of the kind mentioned in the proviso to s. 26, sub-s. 2, of the Bankruptcy Act, 1914 (1), were proved, but a number of the other special

(1) Bankruptcy Act, 1914, s. 26 (as amended by Bankruptcy (Amendment) Act, 1926, s. 1, sub-s. 1):

Sub-s. 1: "A bankrupt may, at "any time after being adjudged "bankrupt, apply to the court for "an order of discharge . . . ."

Sub-s. 2: "On the hearing of "the application the court shall "take into consideration a report "of the official receiver as to the "bankrupt's conduct and affairs "(including a report as to the "bankrupt's conduct during the "proceedings under his bank-"ruptcy), and may either grant "or refuse an absolute order of "discharge, or suspend the oper-"ation of the order for a specified "time, or grant an order of dis-"charge subject to any conditions

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facts named in sub-s. 3 of that section were proved, and Mr. Registrar Parton, on April 22, 1947, made an order suspending the discharge of Mrs. Feldman for two years, and that order was not appealed against. In the case of Tabrisky it was ordered " that the discharge of the bankrupt, Abraham " Tabrisky be suspended for two years, and that he be dis- " charged as from April 22, 1949, subject to the following " condition as to his future earnings, after-acquired property " and income, which condition shall operate concurrently " with the aforesaid suspension, and shall continue to operate " if necessary, after April 22, 1949, that is to say—the bankrupt " Abraham Tabrisky shall pay to the official receiver as trustee " for distribution among the creditors in the bankruptcy 110*l*. " per annum by equal monthly instalments of 9*l*. 3*s*. 4*d*., " the first payment to be made on May 1, 1947, and subsequent " monthly payments to be made on the first day of each " succeeding month thereafter, until the creditors in the joint " estate shall have received a dividend of 2*s*. 3*d*. in the " pound."

From this order the Board of Trade appealed, as a decision of the Court of Appeal was desired on the question whether there was jurisdiction, in a case falling within the proviso, to couple one of the statutory alternative conditions—in this case

" with respect to any earnings or " income which may afterwards " become due to the bankrupt, or " with respect to his after-acquired " property : Provided that where " the bankrupt has committed any " misdemeanor under this Act, or " any enactment repealed by this " Act, or any other misdemeanor " connected with his bankruptcy " or any felony connected with his " bankruptcy, or where in any " case any of the facts hereinafter " mentioned are proved, the court " shall either

" (i.) refuse the discharge ; or

" (ii.) suspend the discharge for " such period as the court thinks " proper ; or

" (iii.) suspend the discharge " until a dividend of not less than " ten shillings in the pound has " been paid to the creditors ; or

" (iv.) require the bankrupt as " a condition of his discharge to " consent to judgment being " entered against him by the " official receiver or trustee for " any balance or part of any " balance of the debts provable " under the bankruptcy, which is " not satisfied at the date of the " discharge, such balance or part " of any balance of the debts to " be paid out of the future earnings " or after-acquired property of " the bankrupt in such manner " and subject to such conditions " as the court may direct . . . ."

Sub-s. 3 specifies twelve " facts " as those referred to in the foregoing proviso.

Sub-s. 8 : The powers of suspending and of attaching conditions to a bankrupt's discharge may be exercised concurrently.

suspension for two years—with a condition as to future earnings and the like, under the general power outside the proviso. It was said that such an order might lead to administrative difficulties where, as in the present case, the periodical payments would continue for a considerable time after the date of discharge.

Aronson for the Board of Trade.

I. H. Jacob and *Russell Lawrence* for the bankrupt were not called on.

Lord Greene M.R. This is an appeal by the Board of Trade against an order made by Mr. Registrar Parton in relation to the discharge of two bankrupts. The appeal only relates to the order as it affects one of those two, namely, Abraham Tabrisky.

The point raised by the appeal is whether or not the registrar had jurisdiction to make the order that he did make. The bankrupts were adjudged bankrupt on June 25, 1930. There had been committed by them in their business certain acts and in the bankruptcy certain events happened which are described in sub-s. 3 of s. 26 of the Bankruptcy Act, 1914. I need not go through them. They were not misdemeanors or felonies, but certain facts were proved which brought into operation the proviso to sub-s. 2 of s. 26.

Had the matter stood there, Mr. Aronson, for the Board of Trade, admits that there could be no question but that the registrar had jurisdiction to make the order which he did make. It is not, of course, contested that the part of the order which suspends discharge for two years is within the powers of the registrar. What is complained of is the attachment of a condition with regard to payment of sums of money out of the bankrupt's future earnings, that payment being one which will continue after the discharge has become effective, provided, of course, that the bankrupt does not pay up in advance. Assuming he makes the payment mentioned in the order, and no more, apparently it will take four or five years to comply with that part of the order; that is to say it will go on for two or three years after the order of discharge becomes effective.

That condition, it is said, it was not competent to the registrar to impose in this case. The argument proceeds on these lines. The general power to impose conditions under sub-s. 2, which admittedly would include such an order as the present, is cut down by the proviso which follows. Mr. Aronson says that in a case to which the proviso applies no conditions can be attached to an order for discharge other than the one condition mentioned in para. (iv.) of that proviso, in other words, if the registrar thought it right to suspend discharge and thought it right also to extract from the bankrupt something from his future earnings, the only thing he could do was to require the bankrupt to consent to a judgment such as is mentioned in para. (iv.). The effect of the proviso, in other words, he says, is to destroy the general power to attach conditions given by the body of the sub-section and to substitute a limited power confined to the attachment of one condition, and one condition only. That in my opinion, is a misconception of what the sub-section says. The sub-section starts, as I have already said, with a general power, expressed in very wide language, to attach conditions to an order of discharge and under sub-s. 8 it is competent both to suspend a discharge and to attach conditions. All that the proviso does is to put a qualification on the power to attach conditions. That qualification is, of course, limited to precisely what the proviso says. Once the requirements of the proviso are complied with, there is nothing left to affect or cut down the general power to attach conditions on which the proviso is a proviso. It is common learning that the object of a proviso is to cut down or qualify something which has gone before. The thing which has gone before is the general power to give a discharge, absolute or suspended, and to impose conditions of the widest possible kind. It would be contrary to the ordinary operation of a proviso to give it an effect which would cut down those powers beyond what compliance with the proviso renders necessary.

What the proviso does is this. It does not give powers; it qualifies powers already given, and provides that in the exercise of those powers the court shall be subject to certain limitations in the sense that one or more of the stated alternatives is made obligatory. There are four alternatives. They are not cumulative obligations, they are alternative obligations. The court may refuse the discharge, it may suspend the discharge for a period, it may suspend the discharge until a dividend of not less than 10*s.* is paid, or it may require as a condition of discharge consent to judgment. The court, therefore, in carrying out its duties in a case to which the proviso applies, finds that it must select one of those four alternative courses. Once it has complied with that minimum requirement of the proviso, the proviso, it seems to me, has finished its work. It is no longer in operation, because the court can say: "I have done "exactly what you, the legislature, told me to do, namely, that "I must do one or other of the four things mentioned."

That being so, what is there left to take away the general power to impose conditions given by sub-s. 2? I can see nothing. It appears to me that to give the proviso the effect that Mr. Aronson contends for would involve the re-writing of the proviso. It would mean that the court not only is compelled to choose one of those four but it must not impose any other condition. Nowhere does the proviso say that. When, therefore, you have carved out of the general power that limitation which the proviso requires you to carve out of it, you have done all that is required. In the result, of course, the power to impose conditions remains as laid down in the body of the sub-section.

The matter is not without authority in this court, by which, in my opinion, we should be bound. *In re Dallmeyer* (1) was a decision under s. 8 of the Bankruptcy Act, 1890. That Act did not in any material respect for present purposes differ from the section we have to consider save in one particular, that alternative 2 mentioned in the proviso referred not to suspension of the discharge for such period as the court thought proper but to suspension of the discharge for two years, in other words, the minimum punishment (using that phrase in quite a general way for convenience), which was to be imposed in the matter of suspension, was a suspension for two years. That has now been altered, and the period of suspension under the proviso may be whatever period the court thinks proper. In *In re Dallmeyer* (1) what had happened was this. Certain of the necessary facts to bring the proviso into operation had been proved and, to that extent, it was similar to the present case. Mr. Registrar Giffard made an order. He granted an immediate discharge and added a condition to this effect, that the bankrupt, after setting aside 500*l.* a year out of his earnings for his own support, was to pay the surplus, if any, to the trustees until the creditors received 10*s.* in the pound on their debts. The bankrupt appealed. It is perfectly obvious, if I may say so, on the face of that order, that it did not comply with the proviso. It granted an immediate discharge. It therefore did not comply with paras. (i.), (ii.) and (iii.) of the proviso. It did not require as a condition of discharge the bankrupt's consent to judgment being entered. It therefore did not comply with para. (iv.) of the proviso. The

(1) (1906) 22 T. L. R. 445.

result, therefore, was that Mr. Registrar Giffard had not done what the proviso required him to do, and it was admitted by counsel there that the order could not stand. It is to be noted that the condition imposed by Mr. Registrar Giffard was a condition to pay all earnings over 500*l*. a year to the trustees until the creditors had received 10*s*. in the pound. It was a totally different condition, as I have already said, from that mentioned in para. (iv.) of the proviso. When the matter came to this court all that the court did was to put the order into shape and to make it a proper order by inserting in it one of the obligatory terms which the proviso requires. They inserted a suspension for two years, which is one of the four alternatives mentioned in the proviso to sub-s. 2, but they did not interfere with the other condition which Mr. Registrar Giffard had imposed. If Mr. Aronson's argument was right, that decision was wrong, because it was a case where the proviso applied. the discharge had been suspended and a condition had been imposed which is not the condition mentioned in para. (iv.) of the proviso but could only have been lawfully imposed if it was imposed under the general power contained in the body of sub-s. 2. That is a decision on which Mr. Registrar Parton says in his judgment the practice has been based, and innumerable orders have been made on that basis. The order which is now appealed from is an order of that type. Even if I had not come to the conclusion that I have come to, I should feel myself bound to follow that decision. Mr. Aronson wished us to hold that it was a decision which we were not bound to follow, because he says the point was not argued. With all respect to him, the point is one which I cannot help thinking stands out immediately one reads the sub-section, and I certainly do not claim for myself any extraordinary measure of perspicuity when I recall the fact that I raised this point the moment I read the section and understood what the point was about. I certainly think Lord Collins, Romer and Cozens-Hardy L.JJ. were much more capable than I am of noticing a point which stands out clearly for everyone to see. I therefore cannot draw the inference that the point was not argued. There is nothing in the report to suggest that it was not argued, and, in my opinion, we are bound to follow that decision.

In the result, the appeal will be dismissed.

COHEN L.J. I agree, and I only want to add a word on one point. Mr. Registrar Parton in the last paragraph of his

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judgment said that he desired to secure for the creditors a sum of some 500*l.*, and he, therefore, imposed the condition which my Lord has read. Then he said this: "As for the reasons "above stated this cannot, in my view, be achieved by an "order under s. 51, sub-s. 2 or a judgment and suspension "order under (iv.) and (ii.), it must be achieved by a Dallmeyer order." Mr. Aronson invited us to say that the learned registrar was wrong in thinking that no order could be made under s. 51, sub-s. 2, or that no judgment and suspension order could be effectively made under paras. (iv.) and (ii.) of the proviso. So far as the first point is concerned, that is to say the point relating to s. 51, sub-s. 2, which enables the court during a bankruptcy to secure the appropriation of a portion of a debtor's salary for the creditors, Mr. Aronson relied on a decision of Morton J. as he then was, in *In re Gardner* (1). On the other alternative of a judgment and suspension under paras. (iv.) and (ii.) of the proviso to sub-s. 2, he relied on sub-s. 8. Mr. Aronson gave us an interesting argument on those points but they do not really arise in view of the conclusion to which we have come, that the registrar had jurisdiction to make the order which he did make under *In re Dallmeyer* (2). As there is nobody really interested to present the contrary argument to that advanced by Mr. Aronson, I think it would be most undesirable to express any opinion as to the correctness of the argument. I only mention the point in order that it may not be assumed that because we have confirmed Mr. Registrar Parton's decision we necessarily agree with the observations in the concluding paragraph of his judgment. I agree that the appeal should be dismissed.

ASQUITH L.J. I also agree and have nothing to add.

Solicitors: *Solicitor to the Board of Trade; Samuel Dalton.*

(1) [1942] Ch. 50. (2) 22 T. L. R. 445.

J. W. H.

JENKINS J.

1947

June 26.

In re POWER. PUBLIC TRUSTEE *v.* HASTINGS.

Will—Administration—Residue settled on trust for sale—Investment clause authorizing purchase of land—Purchase of residence for tenant for life not authorized—Meaning of "investment."

The testator by his will gave all his residuary estate to the Public Trustee upon trust to sell and invest and to hold the trust fund so constituted upon trust for his wife for life and after her death for his children and issue. Clause 8 provided "All moneys requiring "to be invested under this my will may be invested by the trustee "in any manner in which he may in his absolute discretion think "fit in all respects as if he were sole beneficial owner of such "moneys including the purchase of freehold property in England "and Wales." The testator's widow had asked the trustee to apply part of the trust fund in the purchase of a freehold house with vacant possession for her to live in with the testator's children:—

Held, that cl. 8 of the will only authorized the purchase of freehold land as an investment. The purchase of freehold land for some purpose other than the receipt of income was not an investment. Accordingly, the Public Trustee had no power to purchase a freehold house with vacant possession as a home for the tenant for life and the testator's children.

In re Wragg [1919] 2 Ch. 58 considered.

ADJOURNED SUMMONS.

Edward Hunter Power, by his will, dated February 1, 1940, after appointing the Public Trustee to be sole executor and trustee thereof, gave all his residuary estate to the Public Trustee upon trust for sale, conversion and investment. After providing for the payment of an annuity to his wife for life, and for the setting aside of certain capital sums which he settled on his children and their issue, the testator directed the Public Trustee to pay the income of the residue of his estate to his wife for her life, and, after her death, to hold the capital upon the trusts therein before declared of the settled legacies for the benefit of his children and their issue. Clause 8 of the will provided "All moneys requiring to be invested under this "my will may be invested by the trustee in any manner in "which he may in his absolute discretion think fit in all respects "as if he were the sole beneficial owner of such moneys including "the purchase of freehold property in England or Wales."

The testator died on November 18, 1945. He was survived by his widow, the first defendant, Mary Hastings, who had remarried; and by three children, the last three defendants, who were all under twenty-one. The tenant for life had requested the Public Trustee to apply part of the capital of the residuary trust fund in the purchase of a freehold dwelling house with vacant possession, which she wanted to occupy as a home for herself and the testator's children.

By the summons the Public Trustee asked whether he had power to purchase a freehold residence in England or Wales, not as an investment but with vacant possession for the occupation of the tenant for life as a home for herself during her life or any less period, and upon the terms of her paying all the outgoings and keeping the premises in repair and insured.

Wilfred Hunt (*T. A. C. Burgess* with him) for the Public Trustee.

Winterbotham for the tenant for life. It is clear that cl. 8 of the testator's will, apart from the final words "including the "purchase of freehold property in England or Wales" authorizes investment in the purchase of land: *In re Wragg* (1). These concluding words prima facie add to the powers conferred by the clause and give power to purchase land, not only as an investment producing income, but also for the purpose of occupation by the tenant for life.

A. W. L. Franklin for the last three defendants, the testator's children, who were entitled to reversionary life interests, supported the argument for the tenant for life.

Wilfred Hunt (*T. A. C. Burgess* with him), for the testator's unborn grandchildren who would ultimately become entitled to capital. Clause 8 is an investment clause. The last words do not authorize a purchase of land which is not an investment. It is clear from the observations of Lawrence J., in *In re Wragg* (1) that there is a difference between buying a house which is subject to a lease and buying a house with vacant possession. The latter purchase is not an investment.

JENKINS J. The question raised by this summons is whether the Public Trustee, as sole trustee of the will of the testator, is empowered by the will to apply part of the trust fund in the purchase of a freehold house to be occupied as a home by the testator's widow, who has since his death remarried, and the testator's children, upon suitable terms as to repair, insurance, and so forth.

(1) [1919] 2 Ch. 58.

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This question turns entirely upon cl. 8 of the will. [His Lordship read cl. 8 and continued :] It has been argued by Mr. Winterbotham, on behalf of the tenant for life, that this clause does authorize the purchase of a house as a home for the family for the following reasons : In the first place, he points out that if one looks at cl. 8, independently of the final provision introduced by the word "including," it is wide enough to authorize the purchase of freehold property as an investment. In support of that contention, he referred me to the case of *In re Wragg* (1), where the wording of the clause was, if anything, narrower than the wording in the present case, and, Lawrence J., as he then was, held that it would authorize the purchase of real estate as an investment.

I agree with Mr. Winterbotham that the words of this clause without regard to the final provision introduced by the word "including," would be wide enough to authorize the purchase of real estate as an investment. I think that really follows from the decision in *In re Wragg* (1).

Having established that proposition, Mr. Winterbotham's next step is to say that the addition of the words "including "the purchase of freehold property in England or Wales" must be construed as extending the effect of the clause so as to authorize the purchase of freehold property otherwise than as an investment, because he says that, if that were not so, these words would be meaningless. He has referred me to the well-known case of *Dilworth* v. *The Commissioner of Stamps* (2), in support of the proposition that the effect of the word "including," when introducing expressions explanatory of the meaning of another word, is prima facie to enlarge the meaning of that word. It seems to me that the words "including the "purchase of freehold property in England or Wales" can be sufficiently accounted for by regarding them as having been inserted by the draftsman ex super abundanti cautela to make sure that no one would suggest that this clause did not extend to the purchase of freehold property as an investment. I think it is pressing the argument altogether too far to say that the effect of inserting those words must be to introduce some process which is not investing at all. If one looks at the grammar of the clause, one finds that "including" refers back to "in any "manner." So one gets "moneys . . . . may be invested ". . . . in any manner . . . . including" a particular manner. That seems to me to lead to the conclusion that what is said in cl. 8 is that the manners or modes of investment authorized are to include investment in the purchase of freehold property. Therefore, it seems to me that this clause, on its true construction, only authorizes the purchase of freehold property as an investment.

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(1) [1919] 2 Ch. 58. (2) [1899] A. C. 99.

I think it is clearly stated by Lawrence J., as he then was, in the case of *In re Wragg* (1), that for this purpose there is a distinction between purchasing freehold property for the sake of the income one is going to get from it and purchasing freehold property for the sake of occupying it or permitting somebody else to occupy it. In the former case, the purchase is, in common parlance, and I think also in legal parlance, accurately described as an investment. In the latter case, it is not necessarily an investment, for it is a purchase for some other purpose than the receipt of income. It may be a purchase which would not be, from the financial point of view, attractive or indeed at all beneficial, because part of the price might be attributable to the special benefit represented by the acquisition of a suitable place in which to live. It follows, if I am right on the construction of the clause, that it does not authorize the purchase of a freehold house with vacant possession as a home for the tenant for life and the testator's children, because such purchase would not be a purchase by way of investment, or, perhaps, more accurately, might not be a purchase by way of investment, inasmuch as part of the money would or might be paid for the advantage of vacant possession and the benefit which the family would get by living in the house.

For those reasons I will declare that the Public Trustee has no power under the will to purchase a freehold residence and premises in England or Wales, not as an investment but with vacant possession and for the occupation of the first-named defendant as a home for herself and the testator's children.

Declaration accordingly.

Solicitors: *Woodcock, Ryland & Company, for Preston & Redman, Bournemouth, for all parties.*

B. A. B.

(1) [1919] 2 Ch. 58, 64, 65.

WYNN-PARRY J.

1947

July 2, 10.

In re INNS, DECEASED.

INNS *v.* WALLACE.

Family provision—Will—Application by widow for maintenance out of income—Trust to permit her to reside in testator's house—Income provided insufficient for upkeep of house—Jurisdiction of court limited—Sale of house impracticable—Power to let—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1.

A testator who died in 1945 leaving a very large estate by his will settled a sum of 85,000*l.* upon trust to pay the income to his widow, during her widowhood, and also devised his residence, a large house in grounds of three acres upon trust for sale, but only with the consent of his widow during her widowhood, and if unsold on trust to permit his widow to reside there, subject to her liability to keep the house in good repair and condition and insured. After her death or remarriage the house was to be offered to the local district council for use as a hospital, and if accepted, the testator bequeathed 10,000*l.* to the council as an endowment fund. After giving a number of pecuniary legacies, some to charities, the residue was divisible among the children of several named persons. The widow now applied to the court for an order for maintenance out of the income of the estate, claiming that the testator intended her to go on living in his residence, but that the income she received under the will was insufficient to enable her to do so, and that she had no property of her own :—

Held, that in all the circumstances, having regard to her position and her husband's wealth, the provision made for her by the will was reasonable and sufficient, and the application failed.

In re Styler [1942] Ch. 387, and *In re Pugh* [1943] Ch. 387 applied.

ADJOURNED SUMMONS.

The facts as stated by his Lordship in his judgment were as follows. The plaintiff in this summons is the widow of Jeremiah Inns, who died on August 28, 1945, and to whom I will refer as " the testator." The plaintiff was born on May 31, 1895, and married the testator, whose second wife she was, on April 24 1933, when she was thirty-seven years old and he was fifty-five years old. Throughout the marriage the plaintiff and the testator, who was a very successful business man, lived at a house called " Springfield," High Street, Stevenage, Herts., the freehold of which was owned by the testator. The house is described by the plaintiff as follows : " Springfield though " attractive artistically is not at all an easy house to run. " It is a roomy house of mixed architecture with a large Georgian " element. It has nine bedrooms and four reception rooms in " addition to the usual domestic offices and has a garden of

" about three acres. The staff required to run the house is " three maids, in addition to two gardeners for the garden." The evidence leads to the conclusion that the parties lived together in a reasonable state of amity and in some little style. The plaintiff stated that the testator, in emphasizing the need for economy on more than one occasion, observed that it cost 3,000*l.* or 4,000*l.* a year to live at " Springfield." The plaintiff further says from various statements made to her by the testator from time to time, into the details of which I need not go, it was plain to her that the testator anticipated that she would continue to live at " Springfield " after his death. I now turn to the testator's will to which I must refer in some little detail. By cl. 2 of his will, dated April 18, 1945, the testator appointed the defendants, Walter Wallace and Richard Alfred Victor White to be his executors and trustees. By cl. 3 he bequeathed his personal articles and effects to his trustees upon trust to permit the plaintiff to have the use and enjoyment thereof or such parts thereof as she might select so long as she should remain his widow, subject to her keeping them in good repair and condition and insured at her own cost, and after her death or remarriage if the Stevenage Urban District Council should accept the offer of " Springfield " for use as a hospital as later provided in the will, the testator bequeathed those chattels to the council for the use or benefit of the hospital, but if the offer should not be accepted by the council he directed that they should fall into and form part of his residuary estate. By the same clause, after some ancillary directions as to the chattels the testator bequeathed to the plaintiff absolutely his wines, liqueurs and consumable stores. By cl. 4 he devised " Springfield," with an exception to which it is not material to refer, to his trustees upon trust that they should sell the property but during the plaintiff's widowhood only with her consent and with the consent of the council, with power to postpone such sale and conversion, and he directed his trustees to invest the residue of the moneys in their names or under their control in or upon investments of trust funds, with the usual power to change such investments. The testator directed that his trustees should stand possessed of " Springfield " if unsold or the investments representing the proceeds of sale and were to permit the plaintiff to reside in " Springfield " for so long as she should remain his widow, subject to her keeping it in good repair and condition, reasonable wear and tear excepted, and also the garden in good condition, and the house and outbuildings comprehensively insured. Secondly, to pay the income from the investments to the plaintiff during her widowhood, and from and after her death or remarriage he directed his trustees to stand possessed of " Springfield " if unsold upon trust to offer it to the council to be used for the purpose of a hospital upon the terms mentioned in the will, and by cl. 5 he provided that after the death or remarriage of the plaintiff if the council should accept the offer of " Springfield " then he bequeathed to them the sum of 10,000*l.* free of duty for the equipment and maintenance of the hospital.

By cl. 6 he bequeathed to his trustees the sum of 85,000*l.* free of all duties, upon trust to invest the same in their names or under their control in any investments authorized by law for the time being for the investment of trust funds, with power to vary such investments for others of a like nature, and stand possessed of the said investments and of the annual income thereof, upon trust to pay the income to the plaintiff during her widowhood, and from and after her death or remarriage the testator declared that the capital and income of such investments should fall into and form part of his residuary estate. By cl. 7 and 8 he bequeathed the sum of 9,000*l.* for the establishment of certain almshouses, and by cl. 9 he bequeathed trust funds of 7,000*l.* each for eighteen persons who were named in that clause, for their lives, and after their death for their respective children for their lives. By cl. 10 he bequeathed pecuniary legacies amounting in the aggregate to 21,850*l.*, and by cl. 11, 12 and 13 he bequeathed three charitable legacies of 500*l.* each.

By cl. 14 the testator gave, devised and bequeathed, all his real and personal estate whatsoever, (except property otherwise disposed of by his will) to his trustees upon trust for conversion, and directed his trustees to stand possessed of the residue in trust for the children of a number of named persons, on terms to which I need not refer.

Danckwerts for the applicant. The testator clearly intended that his widow should go on living at " Springfield " as she did when he was alive. But she has little or no property of her own and she cannot afford to live there on the income of 2,500*l.* less tax, which he has left her. The house and grounds require a large staff, and the total expense of living there, including rates, income tax and sur-tax amounts to at least 3,600*l.* a year. The applicant has made out and put in an estimate of the expenditure. The house cannot be sold without her consent and that of the Stevenage District Council, who want to take it over for use as a hospital in the future. The applicant asks for an allowance of 1,000*l.* a year.

Milner Holland for the trustees.

J. A. Wolfe for a legatee.

J. A. Reid for a residuary legatee. The application is altogether misconceived. The case is not within the intention of the Act. The applicant has been given an income amply sufficient to live on, in accordance with her station in life. The testator might have provided more, but the court cannot remedy that. See *In re Styler* (1) and *In re Pugh* (2). If she cannot afford to live at "Springfield" the trustees can let it, and she can live in a smaller house elsewhere. It is not for the court to make a new will for the testator, as the applicant is asking.

Cur. adv. vult.

July 10. WYNN-PARRY J. read a judgment in which, after stating the facts, he proceeded: Upon the face of the will there would appear to be substantial provision made for the plaintiff, but she maintains, for the reasons to which I shall later refer, that the provision which has been made is not reasonable in the circumstances of this case. The value of the net estate as defined by s. 5, sub-s. 1, of the Inheritance (Family Provision) Act, 1938, is 607,780*l.*, which invested at 3 per cent. would produce approximately 18,230*l.* per annum. The amount required to implement various legacies, including the 85,000*l.* in which the plaintiff has a life interest, is 323,550*l.* The capital sum of 85,000*l.* invested at 3 per cent. per annum would produce 2,550*l.* less tax. In fact, the trustees have, to a large extent, appropriated mortgages to meet this legacy, and the income from this fund is estimated to be approximately 3,244*l.* per annum. Apart from her interests under the will the plaintiff states that she has no property save a few pieces of jewellery, some furniture and a motor-car. The value of the chattels included in cl. 3 (*a*) of the will in which she has a life interest is 1,744*l.*; the value of the wines and consumable stores which are given to her absolutely by cl. 3 (*b*) is 551*l.*; while the value of "Springfield" is estimated at 7,500*l.* The plaintiff maintains that the testator intended her to be

(1) [1942] Ch. 387.

(2) [1943] Ch. 387.

able to live at "Springfield," but with the income at her disposal she will be unable to do so; and that therefore, in the circumstances, the provision made for her by the will is not reasonable. In support of her allegation that her income will be insufficient to maintain both herself and "Springfield" she has put in evidence an estimate of expenditure which she says she must incur in order to live in and maintain "Springfield." The various items total 2,073*l.* 2*s.* 10*d.*, and there are added income tax at the standard rate obtaining for the financial year 1946–1947, 1,384*l.* 4*s.* 9*d.* and sur-tax 154*l.* 14*s.* 0*d.*, making a total of 3,613*l.* 1*s.* 7*d.*, a figure which exceeds the figure of estimated income, viz., 3,244*l.* I do not propose to read this estimate in detail, but there are certain items to which I must refer. The estimate includes the wages, insurance and keep of three indoor servants, together with an annual sum for their uniform, totalling 631*l.* It also includes the wages and insurance of two gardeners, totalling 410*l.* 14*s.* 8*d.* Thus, there is a provision of over 1,040*l.* for the wages of five servants to look after one lady, the plaintiff. The other items are of the usual nature, but the amounts thereof are in the case of fuel and light, and similar items calculated on the basis of four persons living in the house.

Now I mention the details of this estimate, which I have mentioned not with a view to making any criticism of the scale on which the plaintiff is living, or on which she would propose to live, which is no concern of mine, but because it is necessary to have a clear picture of the whole position in mind before coming to a conclusion on the question which I have to resolve, namely, whether in all the circumstances of this case, the provision which the testator has made for the plaintiff is reasonable or not. The question whether or not the jurisdiction which is given to the court by the Act should be exercised is upon occasion a difficult one to answer. In *In re Styler* (1), Morton J. (as he then was), said: "There are one or two observations in "the cases decided on this Act to which I desire to refer, "although I fully appreciate that every case must rest on its "own facts. In *In re Brownbridge* (2) Bennett J. said that the "Act did not throw on a testator a duty to make provision for "his dependants. It only gave the court the right to interfere "if it came to the conclusion that the dispositions which were "made were unwarranted. In that case Bennett J. did not "think it right to interfere with the testator's disposition. "I respectfully agree with the observations which he made.

(1) [1942] Ch. 387, 388, 389.

(2) (1942) 193 L. T. Jour. 185.

" I do not think that a judge should interfere with a testator's " dispositions merely because he thinks that he would have been " inclined, if he had been in the position of the testator, to make " provision for some particular person. I think that the court " has to find that it was unreasonable on the part of the " testator to make no provision for the person in question or " that it was unreasonable not to make a larger provision." Again, as appears from the later case of *In re Pugh* (1) that the mere circumstance that if a judge had been sitting in the testator's armchair he would have made more provision for the dependants, is no ground of itself for exercising the jurisdiction. I must be satisfied that the provision is unreasonable. On the other hand, I must take into account the relations between the parties, their mode of living and the size of the testator's fortune. What would be a reasonable provision for the widow of, for instance, a farm labourer would in ordinary circumstances be unreasonable provision for the widow of a wealthy man.

Nevertheless, I cannot assent to the proposition which is involved in Mr. Danckwerts' argument, that if it appears that the testator intended his widow to live in the marital home, but, by the same will by which he gave her the right to do so, he made provision which was insufficient to enable her to do so, the provision that he has made for her must, therefore, be held to be unreasonable. In my view, the proposition only requires to be stated to be demonstrated unsound. By the law of England as it stood prior to the coming into effect of the Inheritance (Family Provision) Act, 1938, no man could be compelled to leave any part of his estate to any person, who under the Act is a dependant. Still less could he be compelled to make provision that his wife, for instance, should be enabled to live in circumstances similar to those in which, during his life, he and she had lived together. The Act is not designed to bring about any such compulsion. It proceeds upon the postulate that a testator should continue to have freedom of testamentary disposition provided that his disposition as regards dependants should be capable, having regard to all the circumstances, of being regarded by the court as reasonable. From this it follows that the jurisdiction is essentially a limited jurisdiction. The legislature, presumably in its wisdom gave no guidance to the court as to how the jurisdiction should be exercised, but the court in previous cases has evolved certain principles upon which the court should proceed. The previous

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(1) [1943] Ch. 387, 395.

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decisions clearly establish that the jurisdiction is one which should be cautiously, if not sparingly, used. The main difference between this and earlier cases is that this, so far as the reported cases are concerned, is the first case in which an estate of this magnitude has had to be considered. Notwithstanding the size of the estate, however, the same principles must be applied; and, applying those principles it appears to me impossible to say, that merely because there appears from the evidence, and on the face of the will to be an anticipation by or even an intention on the part of the testator, that his widow should continue to live in the marital home in which for the purpose he gives her a life interest followed by a gift of income, which, in the event, proves insufficient to enable her to do so, the provision which he has made for her is unreasonable. I cannot, therefore, accede to the application of the plaintiff that she should be provided with additional spending money out of the estate so that, with the income which is provided for her under the will, she will have sufficient money to maintain the previous style of living at "Springfield," and have, in addition, a spending fund for herself. She asks that this extra spending fund shall be at the rate of 1,000*l*. per annum, a rate which would necessitate a payment at a very large rate out of the income of the estate, having regard to the present incidence of income tax.

There remains, however, the question whether any lesser additional provision should be made for the plaintiff out of the estate. I have given this aspect of the matter careful consideration, but I cannot feel justified in making any order in her favour. After an exhaustive consideration of all the circumstances I come to the conclusion that while, if I had been sitting in the testator's armchair, I might well have avoided tying up "Springfield" so that only the plaintiff's consent to its sale in her lifetime would have been required, and I might well have provided a somewhat larger fund than the 85,000*l*. in view of the size of the estate; yet, bearing in mind the principles upon which I am directed to proceed by the authorities which I regard as binding on me, and with which I am respectfully in agreement, I cannot bring myself to the conclusion that what has been provided is so little as to be unreasonable. From the plaintiff's point of view the provisions regarding "Springfield" are unfortunate in that neither she nor the trustees can bring about a sale during her lifetime. Nevertheless the trustees have power to let the property under

s. 28 of the Law of Property Act, 1925. It was urged upon me on behalf of the plaintiff that in all probability it would be difficult to effect a profitable letting of "Springfield." That may be or may not be the case; but, in the absence of evidence on behalf of the plaintiff, on whom the onus lies, from some competent valuer or estate agent I cannot proceed upon any such assumption. Therefore, I cannot assume that the interest in the house given to the plaintiff under the will is valueless. But further, even if I had been able to come to the conclusion that the interest in the house given to the plaintiff under the will was, in the circumstances, valueless, I do not see how, in exercising my jurisdiction under the Act, I could have come to the conclusion that the income of a fund of 85,000*l.* during widowhood represents so small a provision to the plaintiff as to be unreasonable. The result of the framing of the testator's will may well be, and would appear to be, unfortunate from the plaintiff's point of view, in that she may be unable to continue to reside at "Springfield," at any rate, in the style in which she and the testator resided there, but that is the highest at which this case can be put; but so put it affords me no ground for rewriting the will to any extent. I must, therefore, dismiss the application. The costs of all parties as between solicitor and client will be taxed and paid out of the estate.

Solicitors: *Park, Nelson & Co.; Sharpe, Pritchard & Co., for Longmores, Hertford; Nicholl, Manisty & Co.; Durrant, Cooper & Hambling.*

H. L. L.

Affirmed. H.L. [1949] 1 All E.R. 841.

C. A.

1947

June 6, 9, 10.

Lord Greene M.R., Cohen L.J. and Vaisey J.

In re MIDLETON'S SETTLEMENT.

COTTESLOE (LORD) AND LOYD *v.* ATTORNEY-GENERAL AND MIDLETON (EARL).

Revenue—Estate Duty—Irish settlement—Sale of land—Capital money—Investments in England—Death of first tenant for life—Claim by Estate Duty Office in England in respect of English investments—Claim by Revenue Commissioners in Eire that estate duty payable in Eire—Settled Land Act, 1882, *in force in Eire—Settled Land Act,* 1882 (45 & 46 *Vict., c.* 38), *s.* 22, *sub-s.* 5*—Finance Act,* 1894 (57 & 58 *Vict., c.* 30), *ss.* 1, 2, *sub-s.* 2*—Irish Free State Constitution Act,* 1922 (*sess.* 2.) (13 *Geo.* 5, *c.* 1), *s.* 1, *sch. art.* 73.

C. A.

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MIDLETON'S SETTLEMENT, *In re.*
COTTESLOE (LORD) AND LOYD *v.* ATTORNEY-GENERAL AND MIDLETON (EARL).

Land comprised in an Irish Settlement dated May 15, 1909, was sold and part of the proceeds of sale invested in English securities. On the death of the first tenant for life who was domiciled in England, estate duty was claimed in England but the Revenue Commissioners in Eire then refused to give relief from estate duty unless the validity of the English claim was upheld by the English courts. On a summons taken out by the trustees of the settlement to have it decided whether estate duty was leviable in England on the English investments :—

Held, that the English investments could not be considered to be Irish land by virtue of the Settled Land Act, 1882 s. 22, sub-s. 5, for the following reasons :

(1.) the Settled Land Act, 1882, having been made applicable to the Irish Free State by its constitution which was brought into operation by the Irish Free State Constitution Act, 1922, became an Irish Act in so far as it was rendered applicable to the Irish Free State, and therefore had no application to English investments.

(2.) In any case s. 22, sub-s. 5, of the Settled Land Act, 1882, did not affect the location of investments of capital money, but only provided that they should be considered as land "for all "purposes of disposition, transmission and devolution."

(3.) The assessment to estate duty is not a purpose of devolution for it arose only by the intervention of the Crown as a creditor.

Held, therefore, that estate duty was payable in England under s. 1, of the Finance Act, 1894, and was not excepted from that liability under s. 2, sub-s. 2.

In re Stoughton [1941] I. R. 166 so far as material not followed.

Decision of Roxburgh J., ante, p. 329, affirmed.

APPEAL from Roxburgh J.

By a settlement, dated May 15, 1909, Irish estates were settled in strict settlement on the first Earl of Midleton for life and after his death on the second earl for life with remainders over. After the date of the settlement and during the life of the first earl certain of the lands comprised in the settlement were sold and some of the proceeds invested in English investments, being inscribed or registered stocks or shares transferable in the books of the Bank of England or on registers kept in England. On February 13, 1942, the first earl died while domiciled in England and the second earl who was at all material times domiciled in England, became tenant for life in possession. By letter, dated March 5, 1943, the English estate duty officer claimed estate duty in respect of the English investments. The trustees of the settlement for the purposes of the Settled Land Acts, 1882–1890, did not contest this claim but applied to the Revenue Commissioners in Eire for relief from estate duty in Eire on the English investments. By letter,

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MIDLETON'S SETTLEMENT, *In re.*

COTTESLOE (LORD) AND LOYD *v.* ATTORNEY-GENERAL AND MIDLETON (EARL).

dated November 1, 1944, the Revenue Commissioners in Eire refused to give that relief unless the English courts upheld the validity of the English claim for estate duty. In these circumstances the trustees took out a summons on June 15, 1946, asking whether on the death of the first earl estate duty became leviable here under the Finance Act, 1894, on the English investments.

Roxburgh J. held that the English investments were not situate out of Great Britain and Northern Ireland and could not be treated as Irish land for the purposes of taxation under s. 22, sub-s. 5 (1), of the Settled Land Act, 1882, which had become an Irish Act without any application in England, and therefore, that English estate duty was payable in respect of these investments. The defendant, the second earl of Midleton, appealed.

Upjohn K.C. and *Denys B. Buckley* for the appellant. The English investments of capital money arising from the sale of Irish land are reconverted into Irish land under the Settled Land Act, 1882, which still applies in Eire under the Irish Free State Constitution Act, 1922. That Act, by s. 1, makes operative the Constituent Act scheduled thereto, which had previously been passed as a measure by the House of Parliament constituted under the Irish Free State (Agreement) Act, 1922, as a constituent assembly to settle the constitution of the Irish Free State. The Constituent Act contains in the schedule the constitution which by art. 73 (2) made the Settled Land Act, 1882, applicable in the Irish Free State. The estate duty on the English investments is therefore by virtue of s. 22, sub-s. 5, of the Act of 1882, payable in Eire and the investments are

(1) Settled Land Act, 1882, s. 22, sub-s. 5, provides: "Capital "money arising under this Act "while remaining uninvested or "unapplied, and securities on "which an investment of any such "capital money is made, shall for "all purposes of disposition, trans-"mission and devolution, be con-"sidered as land, and the same "shall be held for and go to the "same persons successively, in the "same manner and for and on the "same estates, interests, and "trusts, as the land wherefrom the "money arises would, if not dis-"posed of, have been held, and "have gone under the settle-"ment."

(2) Article 73 provides: "Sub-"ject to this constitution and to "the extent they are not incon-"sistent therewith, the laws in "force in the Irish Free State ". . . . at the date of the coming "into operation of this constitu-"tion shall continue to be of full "force and effect until the same or "any of them shall have been "repealed or amended by enact-"ment of the Oireachtas."

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exempted from the duty otherwise payable in England under s. 1 of the Finance Act, 1894, by reason of s. 2, sub-s. 3, as being property outside Great Britain and Northern Ireland which is not liable for succession duty.

It is true that the investments are in the name of the trustees who are domiciled in England, but it is necessary to look at the settlement and apply the law applicable to that settlement and that is the Settled Land Act, 1882, s. 22, sub-s. 5, which provides that "for all purposes of disposition, transmission and "devolution" the investments are to be considered land—that is Irish law. It is said that the Settled Land Act, 1882, is an Irish statute but it was not passed by an Irish Parliament but by the English Parliament and it is the English Parliament that makes it applicable to the Irish Free State by the combined effect of s. 1 of the Irish Free State (Agreement) Act, 1922, and art. 73 of the schedule to the Constituent Act. Of course, the Settled Land Act, 1882, continued to apply in England as well as the Irish Free State until the Settled Land Act, 1925, came into force in England. It is as though the English Parliament had enacted that all investments of capital money being the proceeds of land in Eire should be deemed to be land situate in Eire. In s. 22, sub-s. 5, of the Settled Land Act, 1882, in its application to Eire land must be taken to mean land in Eire.

[Lord Greene M.R. Section 22, sub-s. 5, only applies "for "all purposes of disposition, transmission and devolution." Is there any authority that purposes of devolution include purposes of duty?] It was so held in Ireland in *In re Stoughton* (1). Where the Act says for all purposes of devolution that must include the estate duty which the Crown steps in and demands before devolution is allowed to take place. [They referred to *In re Cutcliffe* (2) and *In re Cartwright* (3).] *In re Stoughton* (1) is directly in point here.

[Lord Greene M.R. That case turned on the liability to succession duty.] True, but at the end of his judgment Hanna J. decided, as an alternative ground, directly in favour of the present contention. [Lord Greene M.R. The argument on both sides only related to the succession duty point.] Lastly, in *Duke of Marlborough* v. *Att.-Gen.* (*No.* 2) (4) it was conceded by the Crown that purposes of devolution included fiscal matters.

(1) [1941] I. R. 166.
(2) [1940] Ch. 565.
(3) [1939] Ch. 90.
(4) [1945] Ch. 145.

J. H. Stamp for the Attorney-General. The *Marlborough* case (1) had no relation to s. 22, sub-s. 5, of the Settled Land Act, 1882, but raised a question of partial exemption from duty under s. 5, sub-s. 5, of the Finance Act, 1894. The court should not have regard to cases relating to a trust for conversion which is unlimited in its effect while s. 22, sub-s. 5, has a strictly limited effect. There is no complete conversion into land in equity under the Act of 1882. The *Marlborough* case (1) has, therefore, no bearing. Section 22, sub-s. 5, of the Settled Land Act, 1882, does not concern itself with the locality of investments of capital money but merely says how they are to pass. This is made clear by the latter part of the sub-section which provides that the investments to be considered as land for certain purposes are to " go to the same persons successively " in the same manner and for or on the same estates, interests " and trusts " as the original land would have gone on under the settlement. All that the sub-section is concerned with is beneficial devolution. English investments cannot be transferred across the Irish sea. Again, the Act of 1882 is an Irish Act. It is the constitution of the Irish Free State which makes the Act apply to the Irish Free State and that can only mean that it becomes an Act of the Irish Free State. The Parliament in this country could not amend or alter it because it is part of the Constitution of the Irish Free State. While the Act continued to apply to England, there was a division of the Act, and it left each part applicable only to the place to which it related. Now it has ceased to operate in England but it continues so far as converted into an Irish Act and as such cannot effect locality or character so far as England is concerned. It is embedded in the Irish constitution. Such an Act cannot overrule the Finance Act, 1894. But if the investments were to be treated as the land from which the investments arose, what is then to transfer the investments? Section 22, sub-s. 5, only says how they are to devolve. The investments have therefore passed and become subject to estate duty under the Finance Act, 1894. [He referred to *Attorney-General* v. *Milne* (2) and *In re Haig* (3).]

Upjohn K.C. replied.

LORD GREENE M.R. This is an appeal by the second defendant, the second Earl of Midleton, who is tenant for life in

(1) [1945] Ch. 145.
(2) [1914] A. C. 765, 779.
(3) (1922) but first reported in (1938) 17 Annotated Tax Cas. 644.

possession under a settlement of May 15, 1909. The question raised by the appeal is as to the position with regard to estate duty of certain investments held by the trustees of the settlement for the purposes of the Settled Land Act, 1882. Those with which we are concerned are the English investments described as being "inscribed or registered stock or shares "transferable in the books of the Bank of England or on "registers kept in England." Therefore, they are, prima facie, located in England. Under one of the well known rules which attribute location to property, the location of shares in an English company, transferable on an English register, is to be treated as in this country. The settlement was originally a settlement of Irish land. The appellant and his father, the first tenant for life and the first earl, were both domiciled in England, the father being domiciled there at the date of his death, and the appellant being domiciled there now. The trustees are in England and the investments are in England. Therefore, prima facie, I should have thought that there could be no question but that, on the death of the first earl, the property passed within the meaning of the Finance Act, 1894, and on that passing estate duty was attracted. Had the matter stood there, I do not think that this would be contested. But it is said that, for the purposes of estate duty, these investments must be regarded as located in the Irish Free State. The argument in support of that proposition is a complicated one, but it seems to me that there are several grounds for saying that it cannot succeed.

The argument runs somewhat in this way. It is said that the investments, for the purposes of estate duty, must be regarded as land situate in Ireland, and reference is made to s. 22, sub-s. 5, of the Settled Land Act, 1882, which is the relevant Act for present purposes, for a reason which I shall shortly explain. [His Lordship read the sub-section.] First it is said that this sub-section applies to the present case and has the effect of treating these investments not merely as land, but as land locally situated in Ireland, the investments having been derived from the proceeds of sale of the Irish settled land. It is argued that, under that sub-section, the phrase "for all pur"poses of disposition, transmission, and devolution" includes estate duty as being an incident of devolution. That is the first step in the argument.

The next step can best be explained by mentioning the first of the Crown's objections to the appellant's claim. The Crown says : How can an Act, which, in effect, is now to be treated as an Irish Act, operate to defeat the claim of the United Kingdom Revenue to estate duty by making alterations in what is, prima facie, the location of property ? Mr. Upjohn agrees that if, just before the death of the first earl, the Irish Free State Parliament had chosen to pass an Act purporting to declare the locality of property physically situated in England as Irish, that could not possibly have had an extra-territorial effect in this country so as to defeat the operation of the Finance Act as applied to property situated here. That he concedes ; but he says that this is not the position here, because the Settled Land Act, 1882, for all relevant purposes must be regarded not as an Irish Act having territorial effect only within the Free State, but as an Imperial Act which is competent to declare or to regulate questions of the locality of property situated within the jurisdiction of the Imperial Parliament. That argument he seeks to put on its legs in the following way. The Settled Land Act, 1882, was an Act of the then United Kingdom Parliament, and it applied with certain modifications to Ireland. The provisions of s. 22, sub-s. 5, applied to England as much as they applied to Ireland. I would interpose to say that for the purposes of estate duty it made not the slightest difference, before the creation of the Irish Free State, whether property was located in England or Ireland, because it attracted British estate duty in any event. But the argument proceeds to rely on the Irish Free State Constitution Act, 1922 (Session 2), which was passed on December 5, 1922, and was brought into operation by proclamation on December 6, 1922. That Act provided that the Constitution set out in the first schedule to a document referred to as " the Constituent Act " was, subject as mentioned, to be the Constitution of the Irish Free State. I need not deal more with the body of the Act ; but, on turning to the schedule, I find that the Constituent Act is set out, and the Constituent Act itself contained the new Irish Free State Constitution in its first schedule. Article 1 provides that the Irish Free State " is a co-equal member of the Community " of Nations forming the British Commonwealth of Nations," and art. 2 that " All powers of Government and all authority " legislative, executive, and judicial in Ireland, are derived " from the people of Ireland, and the same shall be exercised " in the Irish Free State through the organizations established " by or under, and in accord with, this Constitution." Then, there are a number of provisions for establishing the legislature, the executive, and the judiciary in the Irish Free State. Speaking quite generally, the effect was to constitute the Irish Free State as a co-equal member of the Community of Nations forming the British Commonwealth of Nations, raising it really to the same status as the other self-governing parts of His Majesty's Dominions, such as Australia. At that time the Statute of Westminster had not been passed, but under the recognized Convention which governed the relations of the Commonwealth, the British Legislature would not legislate for such a dominion as the Irish Free State without the consent of that country. That Convention was given the force of law by the Statute of Westminster. I need not examine any other of the provisions of the Constitution, except art. 73, which comes under the heading "Transitory provisions." [His Lordship read the article.] Now, says Mr. Upjohn, the Settled Land Act, 1882, was an Act of the United Kingdom Parliament, having at its date operation both in Ireland and in England. It remains as an Act of that Parliament and, therefore, he says, it is not true to say that he is claiming by virtue of an Irish Act to alter the notional location of property situated in England. He is relying on an Act which always has been and remains an Act of Parliament of the United Kingdom and, therefore, is able to have force in this country and is not confined in its operation to the Irish Free State. The Act of 1882 has been superseded by the Act of 1925 in England, but it has, we are told, never been repealed or modified by the Irish legislature. Therefore, at the date of the death of the first earl, which was the date of the passing of the property, the position was that the Settled Land Act in force in this country was the Act of 1925, and the Settled Land Act in force in the Free State was the Act of 1882. It is said then that the Act of 1882, which has ceased to have operation in this country but remains an Act having force in the Free State, still has the effect of altering in England the locality of property situated in England.

In my opinion, that argument completely breaks down. I will deal with it at once. Article 73 had its force and effect by virtue of the Imperial Act which set up the Irish Free State. There is no question about that. Article 73 is, constitutionally, United Kingdom legislation. Although it originated in a document drawn up by persons responsible for organizing the Irish Free State, it had not thereby any force in law. It could only have the force of law if it were given that force by United Kingdom legislation. But, in my opinion,

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the effect of art. 73 as part of the new constitution is not to give to laws which are thereby said to remain in force in the Free State any extra-territorial effect so as to affect property outside the Free State. I think what it means can only be that within the jurisdiction of the Irish Free State those laws shall continue to operate. To say that they will continue to operate not merely within the jurisdiction of the Irish Free State but extra-territorially, so that they would continue to operate in this country, appears to me to be a mistaken construction and not one which can be accepted in the case of a document which was setting up a new and independent co-equal member of the British Commonwealth.

The result, in my opinion, is that the Settled Land Act, 1882, s. 22, sub-s. 5, cannot be regarded for the present purpose as a section of an Act of the United Kingdom Parliament, but must be regarded in the same way as any Act of the Irish Parliament which, as I have said, could have no jurisdiction to affect the law relating to the locality of property in the United Kingdom or to regulate that locality. Unless Mr. Upjohn can succeed on that argument he agrees he must fail, and, in my opinion, he does fail upon it.

But he also fails, in my view, on his argument on the construction of s. 22, sub-s. 5, itself. This is not a case of equitable conversion, the effect of which in relation to estate duty I need not discuss. Equitable conversion, based on the doctrine that equity regards as done that which ought to be done, requires, in order to change the character of the property, a direction for sale. There is no direction for sale here either in the Act or in the settlement. All that the Settled Land Act does is to give a power of sale. Obviously, it was necessary for the legislature to insert some provision in the Act which would ensure that the exercise of that power should not prejudice the beneficial interests in land sold under the power. That was done by sub-s. 5. In my view, it is quite a mistake to regard this subsection as equivalent to or as expressing the same results as would arise on a conversion under the ordinary equitable doctrine of conversion. It does not say that the capital money and the investment of the capital money are to be considered for all purposes as if they were the proceeds of a direction to sell the land under the doctrine of equitable conversion. It does not say anything of the kind. It is only for certain limited and stated purposes that the proceeds are to "be considered as "land," and they are to be "held for and go to the same persons

" successively, in the same manner and for and on the same " estates, interests, and trusts, as the land wherefrom the " money arises would, if not disposed of, have been held and " have gone under the settlement." The object clearly is to preserve the beneficial interests and cause them to attach to the capital money in the same way as they attached to the land from which it was derived.

Mr. Upjohn's argument involves two propositions. First, he has to say that the phrase " for all purposes of disposition, " transmission, and devolution " includes the purposes of estate duty; and he also has to say that the effect of sub-s. 5 is to treat for those purposes capital money as located in the same place as the land was located from which it was derived. This sub-section appears to me to have nothing to do with location. It is not a matter which was relevant for the purposes of the sub-section. All that the sub-section was intended to do was to ensure that the beneficial interests should be the same as regards capital moneys as they were with regard to the land. In order to effect that result it was not necessary to bring in any reference to location at all. Wherever the land was located the same result would follow—the beneficial interest would be preserved by virtue of those words. But, quite apart from that, the insertion in the sub-section of the words " for all purposes " of disposition, transmission, and devolution " shows that it is only for those selected purposes that capital money is to be considered as land. The sub-section quite clearly recognizes that for any purposes not falling under those three heads, capital money will not be considered as land because there is nothing to make it land. Therefore, it would remain personal property. Mr. Upjohn says estate duty is only exigible on a devolution described as a " passing " under the Finance Act. I am not going to stop to consider whether the word " passing " and the word " devolution " mean the same thing. I venture to doubt it for reasons which I need not go into, but I express no opinion about that. What I do think is that estate duty is not a purpose of devolution. The devolution of property, if it be treated as the equivalent of passing, is merely the occasion on which the Crown steps in and levies duty. It is an incident, not a purpose, of devolution. It is something entirely outside the beneficial interests which are preserved by the sub-section. The Crown is a third party intervening on the occasion of the devolution and taking a toll. It seems to me impossible to say that this is covered by the sub-section. In my opinion, that argument also fails. But Mr. Upjohn relied on certain authorities, and his principal authority was the Irish case of *In re Stoughton* (1). That was a case which raised a question under s. 2, sub-s. 2, of the Finance Act, 1894, which still is in operation in the Free State. The sub-section is as follows: "Property passing on the death of the deceased, when situate "out of the United Kingdom, shall be included only, if, under "the law in force before the passing of this Act, legacy or "succession duty is payable in respect thereof, or would be so "payable but for the relationship of the person to whom it "passes." In the application of that sub-section, for "the "United Kingdom" would have to be read "Eire." The case turned really on the question whether succession duty would be payable. That was the only matter which was argued The question of the notional location of the English investments there involved, which were derived from sales of Irish land, was, so far as the report is concerned (which, by the way, contains a very full statement of the argument on both sides), not discussed by counsel. Hanna J. came to the conclusion that Irish succession duty would have been payable and, therefore, that estate duty was also payable. I might mention that there is no question about the Settled Land Act, 1882, s. 22, sub-s. 5, in this case. But, at the conclusion of his judgment, Hanna J. refers to the Settled Land Act, which he said for the purposes of that case was an Irish Act. He said (2) the change from Irish land to investments in England was made "in "pursuance of certain statutory rights and privileges given by "the Irish law in relation to land. The sale of the lands was a "joint operation under the powers of the Settled Land Act, "1882, and the Irish Land Act, 1903, the provisions of which "Acts enable the proceeds of the sale to be followed wherever "they may be and in whatever form, so that there is impressed "upon such proceeds the notional character of Irish land." Then he continued: "I am of opinion that the effect of these "sections is to give a complete answer to the argument of the "petitioners and to establish not only that the English securi-"ties are notional Irish land, but that the claim of the Revenue "Commissioners"—those are the Southern Ireland Revenue Commissioners—"to have the estate duty charged upon the "proceeds falls upon them. The succession of William Anthony "Stoughton was, in my opinion, a 'devolution' within the "meaning of the words in s. 22, sub-s. 5, of the Settled Land

(1) [1941] I. R. 166.

(2) Ibid. 181.

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"Act, 1882, under the will, and also one of a series of successions "made by 'the disposition' thereunder. This brings the "securities within one or other, or both, of the words in s. 22, "sub-s. 5, of the Settled Land Act. These words cannot refer "to the barest legal meaning to be applied to the terms and "would, in my opinion, carry with them the legal incidents or "obligations such as estate duty attached thereto by statute "or otherwise." Mr. Upjohn naturally relies on that, and I should, of course, pay great respect to a decision of the learned judge. But I am bound to point out that it was a decision on a point which apparently was not argued before him. He did not have the advantage of having the various difficulties pointed out to him. That being so, I cannot attach to his observations the weight I should otherwise have attached to them. I hope in saying that I shall not be thought disrespectful, but the reasons which I have given are, in my opinion, sufficient to show that, in so far as he held that s. 22, sub-s. 5, could alter the prima facie location of investments representing capital moneys in England, I must disagree with him.

That is the only case in which the point was discussed or referred to in a judgment, except for one casual reference to it, in *Duke of Marlborough* v. *Attorney-General* (*No.* 2) (1). That was a case dealing with an entirely different question. It was dealing with s. 5, sub-s. 5, of the Finance Act, 1894, which concerns, among other things, land settled by Act of Parliament. There was an annuity settled on the first duke, and his heirs and successors, by an Act of Parliament. It was, therefore, personalty in its origin. That was subsequently commuted for a capital sum, and that capital sum was invested by an Order of Court in land in London. Chitty J. who was the judge concerned, made an order under which the London freeholds so purchased were to be deemed temporary investments only, and they were, accordingly, conveyed to trustees on trust for sale with power to retain. The question there was whether the London freeholds came within s. 5, sub-s. 5, of the Act of 1894. It was an entirely different question, but the Crown in the argument made a certain concession for a reason that Mr. Stamp has explained to us. Their argument was that what had to be looked at for the purpose of saying whether the property was land was the original settled property. There was also a statutory settlement of land and it was necessary for the Crown, to be logical, to maintain precisely the same principle in its

(1) [1945] Ch. 145.

argument in connexion with both settlements. The court was considering the question whether the London freeholds were lands within the meaning of s. 5, sub-s. 5, and Morton L.J., as he then was, in delivering the judgment of the court, said (1): "At that date"—that is the date of the death of the ninth Duke, the occasion which was relevant to the claim—"the "London freeholds were undoubtedly lands in fact, and it is "contended by counsel for the duke that the trusts of the deed "of April 11, 1905, were not such as to convert them into "personalty. Counsel conceded, however, that if the deed did "operate to convert the London freeholds into personalty for "the purposes of transmission and devolution, they must also "be regarded as converted into personalty for fiscal purposes." It is to be observed that that was the basis on which the court was approaching it. The court had no need to consider the question we are considering here, and, in particular, the question there had nothing whatever to do with s. 22, sub-s. 5, of the Settled Land Act, 1882. It was a question and a question only, so far as the results of the conversion were concerned, of the effect of the deed of conveyance which, in accordance with Chitty J.'s order, contained a trust for sale. Therefore, it was not concerned with the special statutory provisions under which land sold under the powers of the Settled Land Act is for the limited purposes mentioned in sub-s. 5, of s. 22 to be considered as land.

I do not think I need refer to any of the other cases cited. I might perhaps just mention one, a decision of this court, *In re Cartwright* (2). Mr. Upjohn endeavoured to extract from some words of mine a general proposition which assisted him. I only refer to the case to point out that, when the case is read and the facts are appreciated, it is obvious that the language I used had reference to the particular circumstances in that case and had nothing to do with any question of duty. Those words, in my opinion, cannot be made use of to support Mr. Upjohn's argument in this case.

I hope I have done justice to Mr. Upjohn's careful argument which he put before us with great clearness, but, in my opinion, it fails and the appeal must be dismissed. Roxburgh J. took the same view as to the result, and although the reasons that he gave are perhaps not quite the same in some respects as those which I have stated, I agree that the conclusion to which he came was the correct one.

(1) [1945] Ch. 153.

(2) [1939] Ch. 90.

COHEN L.J. I agree. Mr. Stamp argued that, according to ordinary principles, the investments in question in this case would inevitably be regarded as locally situated in England, and, therefore, subject to estate duty in England. He also pointed out that, to escape this liability, the appellant must establish first that the Settled Land Act, 1882, as it affects Irish land and the proceeds of sale of Irish land, has the force of a statute in this country, and, secondly, that the assessment of liability to estate duty is a purpose of " disposition, transmission, and devolution " within s. 22, sub-s. 5, of the Settled Land Act, 1882. Roxburgh J. decided the case on the ground that the appellant defendant had not negotiated the first hurdle. He was inclined to think that, if he had overcome that obstacle, he would still have fallen at the second one. I agree with the Master of the Rolls that he falls at both fences. I do not desire to add anything to what has fallen from my Lord so far as the first obstacle is concerned ; but I will add just a few words on the question whether the ascertainment of liability to estate duty can be said to be a purpose of " disposition, transmission, " and devolution." Mr. Upjohn pointed out that, in cases where the equitable doctrine of conversion applies the court has given full effect to the doctrine of conversion when considering whether the Crown has the right to demand payment of some particular duty. But that is because of the principle that equity regards as done that which ought to be done. That principle can have no effect here, because there is no obligation under the Settled Land Act, 1882, to invest the proceeds of sale of settled land in land. Land is only one of the investments which are the authorized investments of capital moneys. Mr. Upjohn conceded that he must bring the case within the limited purposes defined by s. 22, sub-s. 5, namely, " the purposes of disposition, transmission, and devolution," but he argued that the liability to estate duty, being an incident inevitably arising on the passing of property, that is to say on the devolution of property, the assessment of duty must be regarded as part of the purposes of devolution. I entirely agree with the observations which have fallen from my Lord in rejecting that argument. It seems to me that what the sub-section is dealing with is the disposition, transmission, and devolution of the beneficial interests in the property. It is not directed at, nor is it framed very aptly to affect, the rights of creditors. The Crown is really in the position of a creditor. It has, it is true, a statutory charge on the assets—including the investments now in question, but its rights none the less are those of a creditor.

For these reasons, in addition to those which were given by my Lord, I agree that this appeal fails and must be dismissed.

VAISEY J. I agree with the judgments delivered by my Lords, and have nothing to add.

Appeal dismissed.

Solicitors: *Warrens; Solicitor of Inland Revenue.*

H. C. G.

In re RIDSDEL.

RIDSDEL *v.* RAWLINSON.

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1947
July 1.

Administration—Judicial trustee appointed of testator's will—Compromise—Payment made by trustee disallowed by auditor—Power of judicial trustee to compromise claims—Duties of auditor—Judicial Trustees Act, 1896 (59 & 60 *Vict., c.* 35), *s.* 1 (1.) ; *Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 15 (*f*)—*Judicial Trustee Rules,* 1897 (*St. R. & O. No.* 708/*L.* 23), *rr.* 12, 14, 15.

By an order dated August 23, 1940, the W. bank was appointed to be judicial trustee of the will of R. in place of all the trustees appointed by the will. The testator's estate included a yacht which had been requisitioned in 1939 by the Ministry of War Transport, the Ministry paying 74*l.* 10*s.* a month as hire. In June, 1945, the judicial trustee agreed to sell the yacht for 11,250*l.* The purchaser was to take possession of the yacht with the benefit of the Ministry's charter. No date was fixed for completion. In the ordinary way the sale of such a vessel would have been completed in about a fortnight. However, it was discovered that she was still registered in the name of the testator and altering the registration took a substantial time. The judicial trustee as a result could not complete until October, 1946. The purchaser threatened to rescind the contract or to claim against the estate for loss of profit caused by the delay. The judicial trustee by way of compromise, in purported exercise of the power conferred by s. 15 (*f*) of the Trustee Act, 1925, paid to the purchaser 223*l.* 10*s.* representing three months hire at the rate paid by the Ministry of 74*l.* 10*s.* a month. On the audit of the bank's accounts under the provisions of the Judicial Trustees Act, 1896, and the Judicial Trustee Rules, 1897, made thereunder, the officer of the court taking the audit disallowed the sum of 223*l.* 10*s.* on the ground that a judicial trustee was not entitled to exercise the power of compromise conferred by s. 15 (*f*) of the Act of 1925 :—

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Held, first, that the payment was a proper payment made in compromise of a claim. Secondly, that a judicial trustee could exercise the powers of compromise conferred by s. 15 (*f*) of the Trustee Act, 1925. Neither the Judicial Trustees Act, 1896, nor the Judicial Trustee Rules, 1897, made thereunder by implication deprived a judicial trustee of the discretionary powers vested in a trustee by the Trustee Act, 1925. Subject to the express provisions of s. 1 (3.) (4.) and (6.) of the Act of 1896, a judicial trustee was in the same position as any other trustee and could exercise all the powers of an ordinary trustee.

The officer of the court conducting the audit of the accounts of a judicial trustee is not confined to vouching those accounts. If he finds a payment in the accounts which on the face of it is improper, it is his duty to disallow that payment. Where, however, there has been a payment of an authorized character, such as a payment in compromise of a claim, in disallowing the payment the auditor would be exceeding his function. He should not strike out such a payment. If the propriety of the payment is open to doubt, his proper course is to leave the payment in the account with an appropriate note calling attention to the relevant circumstances, which, in his view, may give rise to some claim on the part of the beneficiaries.

The beneficiaries should receive copies of the account as submitted for audit, and if there are any corrections or comments made on the account on the audit, then the beneficiaries should receive copies of those corrections or comments.

SUMMONS.

Probate was granted of the will of Ernest Bramwell Ridsdel on September 18, 1939. By an order, dated August 23, 1940, the Westminster Bank was appointed judicial trustee of the will in place of all the trustees appointed by the will.

The testator's estate included a yacht called *Aronia* which was requisitioned in November, 1939, by the Ministry of War Transport, the Ministry paying 74*l.* 10*s.* a month as hire. In April, 1945, the judicial trustee instructed Lieutenant Stanley Gibbs Jones, a shipbroker, to find a purchaser for the yacht. He succeeded in doing so, and by an agreement, dated June 28, 1945, the judicial trustee agreed to sell the yacht for 11,250*l.* The agreement provided for the payment of a deposit of 10 per cent. of the purchase price on the signing of the agreement "and the balance by cash in London within three "business days of vessel being ready for delivery (subject to "charter) and receipt of permit sanctioning transfer of the "vessel to the purchasers and in exchange for legal bill of sale." The vessel was to be purchased "as she lies at Lowestoft and "as inspected by or on behalf of the purchasers on June 13, "1945." The purchasers were to take possession of the vessel with the benefit of the charter of the Ministry of War Transport, the terms of which were set out in a letter addressed to the judicial trustee by the Ministry. Then there was a provision that, "The hire shall not be apportioned from day to day, but "the sellers shall retain all monthly instalments of hire due "before the date of payment of the balance of the purchase "price and the buyers shall be entitled to all such instalments "due thereafter." No date was fixed for completion. It appeared from the evidence that, in the ordinary way, the sale of such a vessel would be concluded in ten days or a fortnight. It was, however, found, when the title to the yacht was investigated, that she was still registered in the testator's name and the registration had to be altered before the sale could be completed. This took a considerable time and the judicial trustee was not in a position to complete before October, 1946. In the meantime, the purchasers threatened to rescind or claim damages for loss of profit resulting from the delay in completion. In these circumstances, the judicial trustee, in purported exercise of the power to compromise conferred by s. 15 (*f*) of the Trustee Act, 1925, paid to the purchasers to settle the claim 223*l*. 10*s*., representing three months hire at 74*l*. 10*s*. a month.

When the judicial trustee's accounts were audited under the provisions of the Judicial Trustees Act, 1896, and the Judicial Trustee Rules, 1897 (1), the officer of the court taking the audit

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(1) The Judicial Trustee Rules, 1897, r. 12: "(1.) A judicial "trustee may at any time request "the court to give him directions "as to the trust or its administration. (2.) The request must "be accompanied by a statement "of the facts with regard to "which directions are required, "and by the fee required under "these rules in respect of a communication from the court with "regard to the administration of "the trust. (3.) The court may "require the trustee or any other "person to attend at chambers if "it appears that such an attendance is necessary or convenient "for the purpose of obtaining any "information or explanation required for properly giving "directions, or for the purpose of "explaining the nature of the "directions."

Rule 14: "(1.) The court shall "give directions to a judicial "trustee as to the date to which "the accounts of the trust are to "be made up in each year, and "shall fix in each year the time "after that date within which the "accounts are to be delivered to "it for audit. (2.) The accounts "shall in ordinary cases be "audited by the officer of the "court, but the court, "if it considers that the "accounts are likely to involve

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disallowed the payment of 223*l.* 10*s.* The judicial trustee took out this summons for an order that the item of 223*l.* 10*s.* paid to the purchasers of the yacht *Aronia* contained in the judicial trustee's accounts for the year ended April 2, 1946 (income payment), disallowed by the officer of the court taking the audit, might be allowed as a proper disbursement, and further, for directions as to the judicial trustee's general powers under the Judicial Trustees Act, 1896, and the Trustee Act, 1925. The beneficiaries interested under the testator's will in the income of his estate were made defendants to the summons.

J. H. Stamp for the judicial trustee. There is nothing in the Judicial Trustees Act, 1896, curtailing the power of a judicial trustee. Such a trustee can exercise the powers conferred by s. 15 of the Trustee Act, 1925. A judicial trustee is under no duty to come to the court for directions before exercising any discretions vested in him. If he had to do so, the appointment of a judicial trustee would result in the same supervision being exercised by the court as if an administration order had been made. The duty of a judicial trustee is to keep the court informed of what he has done and submit accounts. Here the purchasers of the yacht had made a bona fide claim, which the judicial trustee settled in good faith in the ordinary course of business. If the judicial trustee has been negligent in failing to get the yacht registered in its name, the beneficiaries must bring proper proceedings for breach of trust. That matter cannot properly be determined on a summons relating to payments in the accounts.

J. L. Arnold for beneficiaries interested in income. This is not a proper compromise payment. It arose from the negligence of the judicial trustee. The compromise is, in any event, an improper one. The purchasers had no enforceable claim under the agreement for sale. A judicial trustee has no power to exercise the power to compromise conferred by s. 15 (*f*)

" questions of difficulty, may refer " them to a professional accountant for report, and order the " payment to him of such amount " in respect of his report as the " court may fix."

Rule 15 : " (1.) The accounts of " any trust of which there is a " judicial trustee, with a note of " any corrections made upon the " audit, shall be filed as the " court directs. (2.) The judicial " trustee shall send a copy of the " accounts or, if the court thinks " fit, of a summary of the accounts, " of the trust to such beneficiaries " or other persons as the court " thinks proper."

of the Act of 1925 without first obtaining the directions of the court under r. 12 of the Judicial Trustee Rules, 1897.

JENKINS J. [stated the facts and continued :] It seems to me that prima facie, the claim having admittedly been made by the purchasers, this was a payment which the judicial trustee had power to make under s. 15 (*f*) of the Trustee Act, 1925, which (with certain qualifications not here material with respect to sole trustees), empowers a trustee if he thinks fit to " compromise, compound, abandon, submit to arbitration, or " otherwise settle any debt, account, claim, or thing whatever " relating to the testator's or intestate's estate or to the " trust "; and provides that " for any of those purposes he " may enter into, give, execute, and do such agreements, " instruments of composition or arrangement, releases, and " other things as to him or them seem expedient, without being " responsible for any loss occasioned by any act or thing so " done by him . . . . in good faith." It may be that the trustee was open to criticism for not having put the title to the yacht in order at some earlier date, but that I think is really a different matter and does not go to the power of making this compromise, or the propriety of making it, in the circumstances which existed when it was made.

On the audit of the account under the provisions of the Judicial Trustees Act, 1896, and the rules made thereunder, the officer of the court taking the audit took a different view of the matter and disallowed the item in question. The Judicial Trustees Act, 1896, by s. 1, sub-s. 1, empowers the court, in the circumstances mentioned, with respect to any trust in its discretion to " appoint a person (in this Act called a judicial " trustee) to be a trustee of that trust, either jointly with any " other person or as sole trustee, and, if sufficient cause is shown, " in place of all or any existing trustees." In exercise of that power the Westminster Bank in this case was appointed in place of all existing trustees. I apprehend that, subject to the express provisions of the Act (see s. 1, sub-s. 3, as to a judicial trustee being subject to the control and supervision of the court, sub-s. 4 as to the power of the court to give directions, and sub-s. 6 as to the auditing of accounts) a trustee thus appointed is in the position of any other trustee and exercises all the powers of any other trustee, including the statutory power of compromise. I do not think there is anything else in the Act (apart from the power to make rules under s. 4) to which I need refer.

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The question for me is whether, having regard to the provisions of the rules and to the circumstances already stated, in which the payment of 223*l.* 10*s.* 0*d.* was made, the officer of the court taking the audit was right in disallowing that payment. I have had the advantage of an argument addressed to me by Mr. Arnold on behalf of the beneficiaries interested in income, and he strongly contends that the course taken on the audit was right. He says that, on the face of it, the compromise under which this payment of 223*l.* 10*s.* 0*d.* was made was not a proper compromise. He strenuously contends, and invites me to hold, that it was clear on the face of the transaction with the purchasers of the vessel that they had no claim whatever, so that the trustee was, in effect, merely making the purchasers a present, which could not be allowed to stand for a moment. I find myself quite unable to share that view. It seems to me that on the evidence of Lieutenant Jones, the shipbroker who acted in the matter, there was a delay of a quite unusual character in the completion of this transaction. I think it may very well be that the claim made by the purchasers was well founded. It may also very well be, and this would have been a more serious event, that the purchasers, owing to the delay, might, if so minded, have got out of the bargain altogether. It must be remembered in that connexion that the price seems on the face of it, to have been a highly advantageous price, and Lieutenant Jones, the shipbroker, personally thought so. Therefore, I decline to hold that this payment was, on the face of it, improper as a compromise payment.

Then it is said that the necessity for a compromise arose from the negligence of the judicial trustee in failing to see that the vessel was registered in its name. As to that, I do not think it is necessary for me to express any view. If it be true that there was negligence in that matter of such a character as would make the trustee personally liable, then it is open to any beneficiary, who thinks it worth his while, to take proper proceedings against the trustee to make good the resulting loss to the estate. But I cannot see that that possible liability can in any way affect the sum of 223*l.* 10*s.* 0*d.*, appearing in the account for what it is, namely, a payment made in compromise of a claim.

Mr. Arnold referred me to a number of cases. One was *In re Shenton* (1), which I think he cited to me for the proposition

(1) [1935] Ch. 651.

that a payment under s. 15 (*f*) of the Trustee Act, 1925, must be a payment in compromise of a claim. That I agree, but it does not follow that in order to justify a compromise payment it must be established that the claim, if there had not been a compromise, would have succeeded. It seems to me, if one so treats a power of compromise, one reduces it in effect to a nullity.

The only other case referred to by Mr. Arnold which I need mention is the case of *Thomas* v. *Corporation of Devonport* (1), which seems to have been a claim for remuneration by an auditor to a local authority. In considering that claim, it became necessary for the court to consider the amount of work which such an auditor had to do. Lord Russell of Killowen said this (2): "As regards the plaintiff's services as auditor of "the urban sanitary authority, he was entitled to remuneration at the rate of not less than two guineas a day in respect "of the days properly occupied in the work. If the matter had "rested there, and the learned judge, having heard the "witnesses, had come (as he did in fact) simply to the conclusion "that four days in each half-year were ample for the work the "plaintiff had to do in auditing the accounts, it would not be "for the court to review that conclusion. But language was "used which, in my view, suggests too narrow a judgment of "what the proper duties of the elective auditor are. I do not "subscribe to the doctrine that his sole duty is to see whether "there are vouchers, apparently formal and regular, justifying "each of the items in respect of which the authority seeks "to get credit upon the accounts put before the auditors for "audit. I think that is an incomplete and imperfect view of "the duties of the auditors. I think an auditor is not only "entitled, but justified and bound to go further than that, and "by fair and reasonable examination of the vouchers to see "that there are not amongst the payments so made payments "which are not authorized by the duty of the authority, or "contrary to the duty of the authority, or in any other way "illegal or improper. If he discovers that any such improper "or illegal payments appear to have been made, his duty will "certainly be to make it public by report to the authority itself, "and the burgesses who create that authority." If I may so, with respect, there is nothing in that case with which I would venture to disagree. I propose to apply it, so far as I can, to the audit of a judicial trustee's account. It seems to me that the

(1) [1900] 1 Q. B. 16.
(2) Ibid. 20.

officer of the court conducting the audit is certainly not confined to the mere mechanical business of vouching those accounts. It seems to me also that where he finds a payment in the account which is, on the face of it, improper as, to give an example suggested by Mr. Stamp, a sum paid in the purchase of a palpably unauthorized investment, which on the face of the trust instrument was an improper investment, then it is his duty to disallow the payment. Or again, if, on looking at the terms of the trust, he finds that income which ought to have been paid to X. has been, in fact, paid to Y., that is a payment which has no warrant or justification at all, which likewise should be disallowed. But where there is a payment of an authorized character, such as a payment in compromise of a claim, supported by a statement by the trustee saying that the claim was made and he, the trustee, considered it was in the interests of the trust that a payment should be made in settlement of the claim, it seems to me that, by disallowing the payment so made, the auditor would be exceeding his function. There is the payment. Quâ payment it was actually made, that is proved. There is statutory warrant for making it. Therefore, it seems to me that an auditor should not strike it out. If on going into the circumstances, it appears to him that the propriety of the compromise was open to doubt, or the necessity for compromise arose from some antecedent negligence of the trustee, or that the transaction in question might in any other way give rise to some claim on the part of the beneficiaries, it seems to me his proper course is not to disallow the payment but to leave the payment in the account with an appropriate note about it calling attention to whatever the relevant circumstances may be which, in the view of the auditor, might give rise to some claim on the part of the beneficiaries. By doing that I think the auditor has properly discharged his duty. It will be noted that the Judicial Trustee Rules, 1897, include a provision under which the beneficiaries are to receive copies of the account. By acting in the manner which I have suggested, I think the auditor will fully protect the beneficiaries. They will have the account properly audited, palpably erroneous payments disallowed, and attention called to payments made in circumstances which, in the view of the auditor, are or may be open to question.

I think there is only one other point with which I need deal. It is suggested that the provision in r. 12 of the Judicial Trustee Rules, 1897, to the effect that the judicial trustee may at any time request the court to give him directions as to the trust or its administration by implication deprives the judicial trustee of the power of compromise under s. 15 of the Trustee Act, 1925. I cannot think that that is the effect of this rule. After all, the object of the Judicial Trustees Act, 1896, as I understand it, was to provide a middle course in cases where the administration of the estate by the ordinary trustees had broken down and it was not desired to put the estate to the expense of a full administration. In those circumstances, a solution was found in the appointment of a judicial trustee, who acts in close concert with the court and under conditions enabling the court to supervise his transactions. I cannot think that it was intended to complicate the matter by prohibiting such a trustee from exercising any discretion without first going to the court and asking for directions. That, as Mr. Stamp points out, involves this, that whenever the trustee wanted to exercise some discretion, such as the power of compromise under s. 15 of the Trustee Act, 1925, he would perforce have to come to the court for directions ; but (to give only one instance) the court would give no directions without summoning before it all persons interested in the exercise of the discretion in order that the matter might be argued and decided in the presence of all parties. One would thus reduce the administration of an estate by a judicial trustee to very much the same position as where an estate is being administered by the court and every step has to be taken in pursuance of the court's directions. It does not seem to me to be right or necessary to construe the Judicial Trustee Rules, 1897, as having any such effect.

In conclusion, as Mr. Stamp points out, whatever view might be taken of the conduct of the judicial trustee, that is to say, however severe one might be upon it for omitting to see that the yacht was registered in its name, the amount in issue can really only be the interest lost to the estate on the purchase money for the yacht between the date when the purchase might have been completed, if the title had been in order, and the date on which the title was put in order and the purchase was in fact completed, which would have meant interest at, say, 3 or 4 per cent. on the purchase money of 11,000*l.* for a period of three months. It seems to me that in any event, if one is considering the matter from the point of view of loss to the estate, 223*l.* 10*s.* 0*d.* is an overstatement of that loss.

For the reasons which I have stated, it seems to me that this item of 223*l.* 10*s.* 0*d.* ought not to have been disallowed on audit, and it should therefore be allowed. I wish to make it quite clear that the allowance is without prejudice to any claim which any beneficiary may think it worth his or her while to make against the judicial trustee for any negligence or breach of trust which is alleged to have been, or may have been, committed in relation to this matter of the yacht. All I am saying is that, as a matter of audit, the item of 223*l.* 10*s.* 0*d.* should be allowed for what it is, namely, a compromise payment, without prejudice to any question which may be raised about the propriety of the payment or the judicial trustee's conduct in the matter of the yacht or any liability the judicial trustee may be under in respect of it.

J. L. Arnold. There is one further matter on which your Lordship might give a direction. It is the practice at the moment for the accounts of the judicial trustee to be circulated to the beneficiaries before the audit. In view of what has fallen from your Lordship, it might be that your Lordship would think it proper that circulation should, in future, take place afterwards.

J. H. Stamp. Would not the best plan be to circulate before the audit, any addition by the auditor to be supplied afterwards? The beneficiaries would be then in a position to criticize the accounts.

JENKINS J. Rule 15 is ambiguous on the point. It says: "The accounts of any trust of which there is a judicial trustee, "with a note of any corrections made upon the audit, shall be "filed as the court directs," and the judicial trustee is to send a copy of the accounts or a summary of the accounts of the trust "to such beneficiaries or other persons as the court thinks "proper." I think it would be consistent with that to take the course suggested by Mr. Stamp, which seems to me to be the most satisfactory, that is to say: the beneficiaries should receive copies of the account as submitted for audit, and, if there are any alterations or corrections or any comments made on the account on the audit, then the beneficiaries should receive copies of those corrections and comments.

Declaration accordingly.

Solicitors: *Rawlinson & Son; Bower, Cotton & Bower.*

B. A. B.

In re WAKEMAN.

WAKEMAN *v.* WAKEMAN.

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J.

1947

May 9, 22.

Maintenance—Order of justices directing husband to pay maintenance for child—Application to discharge order on ground that husband not the child's father—Whether evidence adduced "fresh evidence"—Jurisdiction—Guardianship of Infants Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 3 (2.) (4.)

The husband left this country in January, 1943, on foreign service and was continuously abroad until October, 1945. During his absence, his wife had a son, born on February 14, 1945, by another man. The husband forgave his wife and they lived together from October, 1945, until February, 1946, when he left her. The wife applied to the justices under s. 3 (2.) of the Guardianship of Infants Act, 1925, for an order for the custody and maintenance of the child. This application was not opposed by the husband, who tendered no evidence. The justices made an order on June 20, 1946, giving the custody to the wife and ordering the husband to pay 10*s.* a week for the child's maintenance. In February, 1947, the husband applied to the justices under s. 3 (4.) of the Guardianship of Infants Act, 1925, for the discharge of the order of June, 20, 1946, on the ground that he was not the father of the child, tendering in support of his application the evidence of a man, who had been with him overseas. It was not disputed that the husband was not the father. The justices held that this was "fresh evidence" and discharged their first order. The wife appealed on the ground that there was no "fresh evidence" before the justices and accordingly they had no jurisdiction to discharge the original order :—

Held, that the evidence of the man who had been overseas with the husband was "fresh evidence" which could not reasonably have been made available at the date of the first hearing. The justices were accordingly right in admitting it and the appeal failed.

Johnson v. *Johnson* [1900] P. 19, considered.

APPEAL from the Willesden justices.

This was an appeal by the wife from an order of the justices discharging their previous order for the payment by her husband, the respondent, of 10s. a week to her for the maintenance of her child.

The following statement of facts is taken from his Lordship's judgment.

The appellant and the respondent were married on May 19, 1934. On January 23, 1943, the respondent (who was then in the army) left this country on foreign service and was thereafter continuously abroad until his arrival back in England on October 5, 1945. During the respondent's absence abroad, the appellant had by another man a son born on February 14, 1945. It appeared that the respondent forgave the appellant, and that they became reconciled and lived together from the respondent's return to this country on October 5, 1945, until February 24, 1946, apart from a further brief absence of the respondent during this period on foreign service with the army, from which he seems finally to have returned on December 15, 1945. It further appeared that the respondent consented (though whether by correspondence during his absence or retrospectively on his return was not clear), to the entry of his own name as that of the father in the registration of the birth of the child.

On or about February 24, 1946, the respondent, having, or believing himself to have, further grounds of complaint as to the appellant's conduct, left the appellant, and he had, since that time, remained separate from her.

On June 20, 1946, the appellant made two applications to the justices against the respondent. The first was in respect of his alleged desertion of the appellant, and the second for the custody of the child and payment of maintenance under s. 3, sub-s. 2, of the Guardianship of Infants Act, 1925 (1). The

(1) By the Guardianship of Infants Act, 1925, s. 3, sub-s. 1: "The power of the court under "section five of the Guardianship "of Infants Act, 1886, to make an "order as to the custody of an "infant and the right of access "thereto may be exercised not-"withstanding that the mother of "the infant is then residing with "the father of the infant." Sub-s. (2): "Where the court "under the said section as so "amended makes an order giving "the custody of the infant to the "mother, then, whether or not "the mother is then residing with "the father, the court may further "order that the father shall pay "to the mother towards the "maintenance of the infant such "weekly or other periodical sum "as the court, having regard to "the means of the father, may "think reasonable." Sub-s. 4: "Any order so made may, on "the application either of the "father or the mother of the "infant, be varied or discharged "by a subsequent order."

By s. 7, sub-s. 1: "For the "purposes of the Guardianship of "Infants Act, 1886, as amended "by this Act, the expression 'the "'court' shall include a court of "summary jurisdiction: Provided "that a court of summary juris-"diction shall not be competent— "(*a*) to entertain any application "other than an application for "variation or discharge of an "existing order under the "Guardianship of Infants Act, "1886, as so amended, relating only evidence tendered was that of the appellant, in the course of which she frankly (but inadmissibly) stated that another man was the father of the child. The justices held desertion not proved and dismissed the appellant's summons in respect of that matter. They then proceeded to deal with the summons for custody and maintenance. This application was unopposed by the respondent, who tendered no evidence. The order of June 20, 1946, was accordingly made under which the respondent was ordered to pay 10*s.* a week for the child's maintenance.

On February 27, 1947, the justices had before them an application by the respondent, under s. 3, sub-s. 4, of the Act of 1925, for the discharge of the order of June 20, 1946, on the ground that he was not the father of the child. On this occasion the respondent tendered in support of his application the evidence of a man named Adcock, a friend of his, who had served with him overseas. This evidence was sufficient to prove that the respondent was abroad at all times material to the conception of the child, and, therefore, he could not have been the father. It was not in any way challenged on behalf of the appellant, whose solicitor in the course of his submission to the court said: "There was no dispute that Mr. Wakeman" (the respondent) "was not the father of the child."

The respondent also gave evidence. Towards the end of his evidence-in-chief he said with reference to the hearing on June 20, 1946: "I had no witness then." In the course of his cross-examination, he said: "On June 20, 1946, I did not give " evidence. I consented to an order under the Guardianship " of Infants Act on advice from my solicitor. The circum" stances to-day are different. Adcock was in England in " June, 1946."

At the conclusion of the respondent's evidence it was submitted on behalf of the appellant that there was no case to

" to an infant who has attained " the age of sixteen years, unless " the infant is physically or " mentally incapable of self-sup" port; or (*b*) to entertain any " application involving the ad" ministration or application of " any property belonging to or " held in trust for an infant, or " the income thereof; or (*c*) to " award the payment of sums " towards the maintenance of an " infant exceeding twenty shillings " a week." Sub-s. (3): " Where " on an application to a court of " summary jurisdiction under the " Guardianship of Infants Act, " 1886, as amended by this Act, " the court makes or refuses to " make an order, an appeal shall, " in accordance with rules of " court, lie to the High Court."

answer on the grounds (in effect) that while there was no dispute that the respondent was not the father of the child, the adultery was condoned, in law the child was a child of the marriage, the respondent had agreed to the order of June 20, 1946, and there was no " fresh evidence " now before the court to support the respondent's application for the discharge of that order.

The justices took time for consideration, and on March 27, 1947, decided that there was a case to answer, and the appellant calling no evidence, stated their conclusion to the effect that the evidence called by the respondent as to non-access was " fresh evidence within the meaning of this Act " (by which they presumably intended fresh evidence for the purposes of an application to vary or discharge an order under s. 3 of the Guardianship of Infants Act, 1925, since sub-s. 4 of that section contains no reference to " fresh evidence ") ; and that, being of opinion that " condonation did not go to the root of " paternity," and having accepted the fresh evidence called on behalf of the respondent, they discharged the order of June 20, 1946. The order of March 27, 1947, the subject of the present appeal, was made accordingly.

J. A. Brightman for the appellant. This question is res judicata. The order of June 20, 1946, can only be discharged under the power conferred by s. 3, sub-s. 4, of the Guardianship of Infants Act, 1925, on fresh evidence. It is not open to the respondent to go behind the first order and say now that he is not the father of the child : *Reg.* v. *Middlesex Justices* (1), *Underwood* v. *Underwood* (2), Criminal Justice Administration Act, 1914, s. 30. If in other proceedings the respondent were held not to be the father of the child, the matter might be re-opened. The court is bound to shut out the evidence as to paternity, as it was not given on the first application. The respondent could have then asked for an adjournment in order to adduce admissible evidence as to paternity. He did not do so and is not entitled now to adduce evidence which was available at the first hearing.

Seuffert for the respondent. The respondent's evidence as to who was the father of the child was not admissible evidence. Accordingly, at the first hearing, there was, in fact, no admissible evidence of paternity. The new evidence adduced on the respondent's application is admissible. Here, two

(1) [1933] 2 K. B. 1.

(2) [1946] P. 84.

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questions arise: first, is fresh evidence necessary before the justices can discharge their order under s. 3, sub-s. 4; secondly, if it is necessary, was the evidence adduced by the respondent "fresh evidence?" There is nothing in s. 3, sub-s. 4, about "fresh evidence." The observations of Scrutton L.J. in *Reg.* v. *Middlesex Justices* (1) were made with reference to different circumstances. It is wrong to read into the sub-section words which are not there. The evidence is in fact "fresh evidence," as it was evidence which could not reasonably have been made available at the first hearing: *Johnson* v. *Johnson* (2). The court has a discretion as to what evidence to admit and the justices in the exercise of their discretion rightly admitted the new evidence adduced by the respondent.

J. A. Brightman in reply. "Fresh evidence" does not include evidence which could have been called before.

Cur. adv. vult.

May 22. JENKINS J. read the following judgment in which he stated the facts and continued: It is obvious from the undisputed facts to which I have already referred that no application by the appellant for an order under s. 3, sub-s. 2, of the Act of 1925 for the payment of maintenance by the respondent, as the father of the child, could have succeeded in the event of those facts being brought to the notice of the court by admissible evidence. In view, however, of the presumption of the legitimacy of a child born to a married woman and the inadmissibility of the evidence of either spouse to rebut that presumption, it was, nevertheless, possible that such an application might succeed merely on the strength of that presumption, in the event of the respondent failing to provide himself at the hearing with sufficient admissible evidence to rebut it; and this appears to have been the course the matter actually took.

His Lordship summarized the course of the proceedings before the justices set out above, and read ss. 3 and 7, of the Guardianship of Infants Act, 1925, and continued:

Although as I have already mentioned, the respondent in his evidence described himself as having "consented" to the order of June 20, 1946, I do not think that order should be treated as having been made by consent, so as to preclude him from subsequently applying for its variation or discharge.

(1) [1933] 2 K. B. 1, 9.

(2) [1900] P. 19.

There is certainly nothing in the terms of the order itself to suggest that it was a consent order, and the justices' note was merely to the effect that the application on which it was made was "unopposed." Nor, in my opinion, did the respondent's condonation of the appellant's adultery afford any valid ground of objection to the respondent's application, and I think the justices were right in rejecting the argument founded upon such condonation.

But, in his extremely fair and careful argument for the appellant, Mr. Brightman before me attacked the justices' order of March 27 1947, on the grounds that: (i.) the subject matter of the order of June 20, 1946, was res judicata, except in so far as it could be varied or discharged under s. 3, sub-s. 4, of the Guardianship of Infants Act, 1925; (ii.) that an order for such variation or discharge could not properly be made except on "fresh evidence"; and (iii.) that the evidence adduced by the respondent at the hearing of February 27, 1947, was not "fresh evidence" within the meaning of that term as defined in the authorities.

As regards the meaning of the term "fresh evidence," I was referred to *Johnson* v. *Johnson* (1), a case under s. 7 of The Summary Jurisdiction (Married Women) Act, 1895, which provides that the court might "upon cause being shown "upon fresh evidence to the satisfaction of the court, at any "time alter vary or discharge" any order made under that Act or the Acts mentioned in the schedule thereto. In that case, according to the headnote, "fresh evidence," within the meaning of the section to which I have just referred, "must "be evidence which could not reasonably have been made "available at the date of the order, or it must relate to something which has happened since the date of the order, and "which affords ground for revision within the terms of the "Act under which the order was made." I advisedly refer to the definition as given in the headnote, because, although in a passage in his judgment (2) Sir Francis Jeune P. refers not to "evidence which could not reasonably have been made available at the date of the order," but to "evidence which has "come to the knowledge of the party applying" since the former hearing or trial "and which could not have come to "his knowledge before that time," it is obvious from the particular evidence held by the court to amount to "fresh

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(1) [1900] P. 19.
(2) Ibid. 19, 21.

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" evidence " in the case then before it, that the intention was to include in the definition evidence falling within the former and wider category, even though its existence might have been known at the time of the former hearing to the party subsequently seeking to adduce it. I was also referred to *Colchester* v. *Peck* (1), and *Underwood* v. *Underwood* (2), in both of which cases a definition of " fresh evidence," by reference to the passage in the judgment of the President in *Johnson* v. *Johnson* (3), to which I have already referred, contained in the judgment of Hill J. in *Timmins* v. *Timmins* (4), was cited with approval. I cannot, however, regard these cases as intending to exclude from the category of " fresh evidence," evidence which could not reasonably have been made available at the time of the former hearing merely because its existence was then known to the party subsequently seeking to adduce it.

As to the necessity for " fresh evidence " in support of an application under s. 3, sub-s. 4, of the Guardianship of Infants Act, 1925, for the variation or discharge of an order made under that section, I was referred to *Rex* v. *Middlesex Justices* (5). The question in that case was whether the refusal by justices on two occasions to make any order on an application by a wife against her husband for custody and maintenance of a child of the marriage under the Guardianship of Infants Act, 1925, made the matter res judicata, so as to preclude them from making an order for custody and maintenance when the application was renewed on a third occasion, and the Court of Appeal (affirming the Divisional Court) held that it did. Scrutton L.J. said this (6) : " It is quite clear that justices can " upon fresh evidence alter, vary or discharge the order they " had previously made . . . . But it appears to me quite " clear that the justices cannot alter their previous order when, " as in this case, there is no evidence of any fresh circum" stances." This passage was strongly relied on on behalf of the appellant in the present case as showing that fresh evidence is necessary to support an application under s. 3, sub-s. 4, of the Guardianship of Infants Act, 1925. With that as a general proposition, I respectfully agree. But it seems to me that if injustice is to be avoided, the stringency of the test to be applied in determining whether further evidence adduced in support of an application under that sub-section ought to be treated as evidence which could not reasonably have been made available at the date of the order sought to be varied or discharged must vary a great deal according to the circumstances of each particular case; and I think, too, that the absence from the sub-section of any express reference to fresh evidence suggests that the court was intended to have greater latitude in dealing with applications under that sub-section than it has under analogous statutory provisions, which expressly require the production of fresh evidence as a condition of the variation or discharge of any order made.

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(1) [1926] 2 K. B. 366, 373.

(2) [1946] P. 84, 86.

(3) [1900] P. 19.

(4) [1919] P. 75, 80.

(5) [1933] 2 K. B. 1.

(6) Ibid. 9.

In any case in which the hearing of an application under s. 3, sub-s. 4, of the Guardianship of Infants Act, 1925, would involve the re-opening of a disputed issue of fact which was contested and decided on the previous occasion, justice to the previously successful party no doubt demands that applicant should be required to satisfy the court with some strictness that it was not reasonably possible for him to adduce at the proper time, that is to say at the time of the previous hearing, the further evidence on which he relies. But where, as in the present case, advantage has been taken of the legal presumption of legitimacy to obtain an order which, if the undisputed facts as known to both parties had been brought to the notice of the court by admissible evidence, would never have been made, I think justice to the party against whom the presumption has been so used demands that the court should view with relative indulgence a subsequent application by him to adduce admissible evidence not previously before the court, on what, after all, resolves itself into a mere matter of technical proof in which he has been out-manœuvred by the opposite party. Further, I think that the question whether, in all the circumstances of a particular case, the further evidence sought to be adduced should be treated as evidence which could not reasonably have been made available at the previous hearing, and admitted as fresh evidence accordingly is essentially a question of fact and degree, and as such eminently a question for the appropriate tribunal of fact, that is to say in the present case, for the justices who heard the respondent's application.

Accordingly, in all the circumstances of the present case, and having regard to the wholly inconclusive character of the respondent's cross-examination on this point, I find myself unable to hold that the justices were wrong in admitting the evidence of Adcock in support of the respondent's application, and having admitted it, I fail to see how they could have done otherwise than discharge the order of June 20, 1946.

JENKINS J.

1947

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I have only to add that Mr. Brightman conceded in argument before me that the language of s. 3, sub-s. 4, of the Guardianship of Infants Act, 1925, should not be construed as precluding the respondent from making an application under that subsection on the ground that he was not the father.

I am accordingly of opinion that this appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Wilfrid Firth & Co., Brentford; F. R. Ferris & Co., Acton.*

B. A. B.

In re MILLER'S AGREEMENT.

UNIACKE *v.* ATTORNEY-GENERAL.

WYNN-PARRY J.

1947

May 20, 21.

Revenue—Estate duty—Succession duty—Covenant by continuing partners with retiring partner to pay annuities to his daughters on his death—Covenant not enforceable by daughters—Whether covenant vests a "beneficial interest" in daughters—Whether "beneficially "entitled"—Succession Duty Act, 1853 (16 & 17 *Vict., c.* 51), *s.* 2—*Finance Act,* 1894 (57 & 58 *Vict., c.* 30), *s.* 2 (1.) (*d*).

The deceased was in partnership with M. and V. He retired in 1942 and pursuant to the terms of the dissolution, by a deed dated February 4, 1942, made between M., V. and the deceased, M. and V. covenanted with the deceased to pay, as from his death, to his three daughters certain annuities for their respective lives. No trust in favour of the daughters was created. The annuities were expressly charged on the partnership assets. The revenue claimed on the deceased's death that his three daughters were liable to pay both estate duty under the Finance Act, 1894, s. 2 (1.) (*d*) and succession duty under the Succession Duty Act, 1853, s. 2, in respect of the annuities which then became payable to them:—

Held, first, that so far as the daughters were concerned the deed of covenant was res inter alios acta. It did not purport to confer any rights on them enforceable at law or in equity. Nor were they entitled thereunder to enforce the charge thereby created. Accordingly, s. 56 of the Law of Property Act, 1925, did not operate to enable them to enforce the covenant. *In re Schebsman* [1944] Ch. 83 considered. Secondly, that "beneficial interest" in the Finance Act, 1894, s. 2 (1.) (*d*) meant an interest in property which would be protected in a court of law or equity. The payments to the daughters under the covenant being merely voluntary as between the daughters and the covenantors, they were not liable to estate duty in respect of the annuities. Thirdly, that the daughters had not become "beneficially entitled" to the annuities within s. 2 of the Succession Duty Act, 1853. Accordingly, they were not liable to pay succession duty.

ADJOURNED SUMMONS.

By a deed of dissolution of partnership made February 4, 1942, between Thomas William Noad of the first part, Dawson Risch Miller of the second part, and George Henry Vos of the third part, after reciting that Mr. Noad had for many years been the senior partner in the partnership known as Charles Taylor & Co., subsisting between Mr. Noad, Mr. Miller and Mr. Vos, it was agreed that the partnership should be determined as from January 1, 1942, and that Mr. Miller and Mr. Vos should continue as partners. Mr. Noad thereby transferred all his interest in the goodwill of the partnership to Mr. Miller and Mr. Vos in consideration of the payment to himself, first, of the sum of 15,000*l.*, secondly, of an annuity of 5,000*l.* during his life, and thirdly of a covenant to be entered into by Mr. Miller and Mr. Vos to pay to Mr. Noad's three daughters, being the plaintiffs herein, certain annuities. It was further provided that the annuity of 5,000*l.* should be paid out of income brought into charge for tax and it was charged on the partnership property.

By a deed of covenant also dated February 4, 1942, made between Mr. Miller of the first part, Mr. Vos of the second part and Mr. Noad of the third part, being the covenant entered into pursuant to the provisions of the deed of dissolution of even date, Mr. Miller and Mr. Vos, by cl. 1, covenanted with Mr. Noad, as from the death of Mr. Noad, to pay the following annuities, namely: first, an annuity of 1,000*l.* to the plaintiff Muriel Ethel Charlton Uniacke during her life; secondly, to each of Mr. Noad's other two daughters, the plaintiffs Kathleen Mary Shoosmith and Eileen Beatrice Charlton Noad, 500*l.* a year during the remainder of their joint lives and an annuity of 1,000*l.* to the survivor for the remainder of her life. It was further provided that if Mr. Noad should die before December 31 1945, an annuity of 1,500*l.* should be substituted for the annutiy of 1,000*l.* and annuities of 750*l.* should be substituted for the annuities of 500*l.*

By cl. 2 it was provided that each annuity should be deemed to accrue from day to day, and should be paid "to the respective "person or persons entitled thereto" by stated quarterly payments. The last paragraph of the deed provided that Mr. Miller and Mr. Vos should procure that each annuity should be paid exclusively out of income brought into charge for income tax, and ended with these words: "Mr. Miller and Mr. Vos "hereby charge all their respective interest in the profits and "assets of the partnership firm with payment of the said several "annuities."

Mr. Noad died on May 5, 1943, whereupon the annuities became payable to his daughters, the plaintiffs, in accordance with the terms of the covenant, and had since been paid without interruption by Mr. Miller and Mr. Vos to the plaintiffs. The Estate Duty Office had claimed that estate duty under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, and succession duty under s. 2 of the Succession Duty Act, 1853, became chargeable on the death of Mr. Noad in respect of the annuities payable under the deed, and that the plaintiffs were accountable for such duties.

In October, 1944, the Court of Appeal held that, on the true construction of the will of Mr. Noad, the estate duty, if any, and the succession duty, if any, payable on the death of Mr. Noad in respect of the plaintiffs' annuities should be borne by his residuary estate. Nevertheless, the plaintiffs were the persons who would be accountable for such duty to the Revenue and, accordingly, this summons was issued by them to determine the validity of the claim put forward by the Revenue.

Cyril King K.C. and *Geoffrey Cross* for the plaintiffs. No beneficial interest arose on the death of Mr. Noad in 1943, so no duty is payable under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894 (1). Section 56 of the Law of Property Act, 1925 (2) does not assist the Revenue. Only a party taking a benefit can sue by virtue of that section. It does not affect the case where the contract is for the benefit of some third party: *In re Schebsman* (1). The effect of s. 56 was considered in *White* v. *Bijou Mansions, Ld.* (2), *In re Sinclair's Life Policy* (3) and *In re Foster* (4). These decisions show the building up of a body of judicial opinion that the section does not apply in a case such as this. At common law the plaintiffs could not have enforced this covenant. A "beneficial interest" to be within s. 2, sub-s. 1 (*d*), must be an interest which is enforceable at the death. Here all the plaintiffs got was an expectation of being paid their annuities. Similarly, they never became "beneficially entitled" to any property within s. 2 of the Succession Duty Act, 1853.

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(1) By the Finance Act, 1894, s. 2, sub-s. 1: "Property "passing on the death "of the deceased shall be "deemed to include the property "following, that is to say:— ". . . . (*d*) Any annuity or other "interest purchased or provided "by the deceased, either by him- "self alone or in concert or by "arrangement with any other "person to the extent of the "beneficial interest accruing or "arising by survivorship or other- "wise on the death of the "deceased."

(2) By the Law of Property Act, 1925, s. 56: "A person "may take an immediate or other "interest in land or other property, "or the benefit of any condition, "right of entry, covenant or "agreement over or respecting "land or other property, although "he may not be named as a party "to the conveyance or other "instrument."

J. H. Stamp for the Attorney-General. When the annuities are paid, the plaintiffs can retain the payments which will become theirs beneficially. The annuities will be paid pursuant to an obligation to pay the plaintiffs. *In re Foster* (4) differs from the present case, as there the person claiming the policy moneys was not entitled to retain them. Where a document such as this deed shows an intention to give beneficial rights to three persons s. 56 of the Law of Property Act, 1925 applies. The charge shows that it was intended to vest an interest in the plaintiffs which they could enforce. If a charge is given to the plaintiffs, s. 2, sub-s. 1 (*d*), applies. Even if a charge is not given to them, the words "interest" in this section is sufficiently wide to include what the plaintiffs take under the deed of covenant. The section may apply though the obligation to pay is imperfect.

Cyril King K.C. in reply. The question is one of construction. The charge was not given to the plaintiffs but to Mr. Noad. It is said that a benefit arises each time a payment is made. The section does not include property which may be paid at a much later date than the death. The plaintiffs' interests would have no market value within s. 7, sub-s. 5, of the Act of 1894. The true view is that each payment is a voluntary payment, voluntary as regards the plaintiffs but not as between the covenantors and Mr. Noad's executors.

WYNN-PARRY J., after stating the facts, said: As regards estate duty, the claim is based on s. 2, sub-s. 1, of the Finance Act, 1894. The property in question in each case is an annuity, and is clearly in each case an annuity purchased or provided by

(1) [1944] Ch. 83.
(2) [1938] Ch. 351.
(3) [1938] Ch. 799.
(4) (1938) 159 L. T. 279.

Mr. Noad, the deceased. However, the vital question is, Did any "beneficial interest" within the meaning of that phrase as used in the section accrue to the plaintiffs on the death of Mr. Noad? In my view, the word "interest" in the sub-section means such an interest in property as would be protected in a court of law or equity. In the present case, it is clear—and Mr. Stamp, on behalf of the Crown, does not contend to the contrary—that the effect of the deed of February 4, 1942, is not to create any trust in favour of the plaintiffs.

It further appears clear to me, from the reasoning of the the Court of Appeal in the case of *In re Schebsman* (1), that at common law the plaintiffs have no right to sue Mr. Miller or Mr. Vos under the deed. Upon the receipt by each of the plaintiffs of any payment in respect of her annuity, the payment and the money so paid will pass to her, but she has no right to compel any payment. At common law, so far as the plaintiffs are concerned, the deed is res inter alios acta, and they have no right thereunder.

Reliance was placed on s. 56, sub-s. 1, of the Law of Property Act, 1925. This section has been considered by the courts on a number of occasions. In *White* v. *Bijou Mansions, Ld.* (2), Simonds J., as he then was, having reviewed the purpose for which s. 5 of the Real Property Act, 1845, had been passed, said: "I think the important aspect of that section for my present "purpose is this. It appears to me to be quite plain that the "section has a limited operation. It is intended to confer a "benefit only on those persons to whom the deed purports to "grant an estate or interest or those persons with whom "there purports to be a covenant or agreement. It is impossible, "in my view, to regard this section as creating a benefit in "favour of any persons who may like to avail themselves of it "and say: 'If we can take advantage of this it will be for our "'benefit'."

Turning to s. 56 of the Law of Property Act, 1925, the learned judge, having read the section, said: "I think many "difficulties may well arise on that section which do not fall "to me to-day to solve. It appears to one at once that, so "far as any other than an immediate interest in land is con"cerned the section is superfluous, because a person always "could take another interest in land though not a party. It is "at least a question how far such a provision is necessary at all "in the case of personalty. Without deciding it, I should be

(1) [1944] Ch. 83.

(2) [1937] Ch. 610, 624.

"disposed to think that equitable estates even in land were not "subject to the old artificial rule and it is very doubtful if an "interest in personalty was ever so subject. However that "may be, for the purposes of the present case I think I am "only concerned with one aspect of this question. Just as "under s. 5 of the Act of 1845 only that person could call it in "aid who, although not a party, yet was a grantee or covenantee, "so under s. 56 of this Act only that person can call it in aid "who although not named as a party to the conveyance or other "instrument is yet a person to whom that conveyance or "other instrument purports to grant some thing or with whom "some agreement or covenant is purported to be made. To "give it any other meaning appears to me to open the door to "claims or assertion of rights which cannot have been con- "templated by the legislature, for if that be not the limitation "which must be imposed on this section it appears to me that "there is no limit and it will be open to anybody to come into "court and say: 'Here is a covenant which if enforced will "'redound to my advantage, therefore I claim the benefit "'of the section. I claim that this covenant or condition is "'one which should be enforced in my favour because it is for "'my benefit whether intended for my benefit or not intended "'for my benefit would not appear to matter.' I cannot give "to the section any such meaning as that. I interpret it as a "section which can be called in aid only by a person in whose "favour the grant purports to be made or with whom the "covenant or agreement purports to be made."

A similar reason underlies the judgment of Luxmoore J., as he then was, in *In re Ecclesiastical Commissioners for England's Conveyance* (1), as was observed by Simonds J. in *White* v. *Bijou Mansions* (2), where he says: "Although the "learned judge"—Luxmoore J.—"appears not to have had "to consider the exact point which Mr. Grant has argued to-day "it is, I think, implicit in his decision, particularly in a passage "beginning: 'What it is necessary to consider is the true "'construction of the conveyance of April 21, 1887, in order "'to ascertain whether any persons, not parties thereto, are "'described therein as the covenantees, and whether such "'covenants are expressed to affect any and what heredita- "'ments,' that the view which I am taking of the section is "one which he also took."

The judgment of Simonds J., as he then was, was upheld in the Court of Appeal (1). Sir Wilfrid Greene M.R., says: " . . . . whatever else s. 56 may mean, it is, I think, confined " to cases where the person seeking to take advantage of it is a " person within the benefit of the covenant in question, if I " may use that phrase. The mere fact that somebody comes " along and says: 'It would be useful to me if I could enforce " 'that covenant,' does not make him a person entitled to " enforce it under s. 56. Before he can enforce it he must be a " person who falls within the scope and benefit of the covenant " according to the true construction of the document in " question."

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(1) [1936] Ch. 430.

(2) [1937] Ch. 610, 626.

Section 56 was also considered in *In re Sinclair's Life Policy* (2), and in *In re Foster* (3), where Crossman J. said this: " Mr. Stone contended that the effect of s. 56 is that any " beneficiary under a contract can sue on the contract although " he is not a party to it. That is substantially what his " submission amounts to. In my judgment, s. 56 does not " have this effect. I think Mr. Stone's contention really " amounts to this, that an agreement by A. with B. to pay " money to C. gives C. a right to sue on the contract, I think it " must go as far as that, and I am not prepared to hold that " s. 56 has created such an enormous change in the law of " contract as would be involved in that proposition, because " that would be, no doubt apart from the section, that nobody " could have ever suggested that a contract by A. with B. to " pay C. a sum of money enabled C. to sue A. on that contract. " I hold, following what I understand to have been the view " that Luxmoore J. expressed in the case of *In re the Ecclesiastical Commissioners for England's Conveyance* (4) and the " view that Simonds J. expressed in *White* v. *Bijou Mansions, Ld.* (5), and the view of the present Master of the Rolls " expressed in the same case on appeal and of Farwell J. as " expressed in *In re Sinclair's Life Policy* (2), that s. 56 of the " Law of Property Act, 1925, can only be called in aid by a " person who, although not a party to the conveyance or other " instrument in question is yet a person to whom that conveyance or other instrument purports to grant something or " with whom some agreement or covenant is thereby purported " to be made."

Mr. Stamp, for the Crown, pointed out that, in both those

(1) [1938] Ch. 351, 365.
(2) [1938] Ch. 799.
(3) (1938) 159 L. T. 279, 282.
(4) [1936] Ch. 430.
(5) [1937] Ch. 610.

cases, the persons claiming the policy moneys were mere nominees, to such an extent that, if the policy moneys had been paid to them, they could not have kept them, while the insurer could have intervened and intercepted them. I agree that these circumstances form grounds for distinguishing those cases from the present, which is, from this point of view, as it appears to me, on all fours with *In re Schebsman* (1). Nevertheless, in both cases the court expressed its views on the section, as will be seen from the extracts I have read from Crossman J.'s judgment. It will thus be seen that there exists a considerable body of judicial opinion showing that the courts have been constrained to limit the scope of this section. I think it emerges from these cases that the section has not the effect of creating rights, but only of assisting the protection of rights shown to exist. Whether or not a right exists is the first question and, in this case, that is a question on the construction of this deed.

Mr. Stamp has put forward certain submissions with a view to showing that, upon its true construction, the document purports to grant to the plaintiffs beneficial interests. If he is right upon that, then, as he contends, s. 56 will operate, but he has been constrained to admit that it is not possible to extract from the terms of the deed the conclusion that there is any purported agreement with the plaintiffs. He points out that the document is a special document, in this sense, that its provisions were not incorporated, as they might have been, in the deed of even date, which is recited in the document, providing for the sale and transfer to Mr. Miller and Mr. Vos by Mr. Noad of the goodwill of the partnership firm and for an annuity to Mr. Noad. Secondly, he points out the provision in the deed for an increase in the annuities in the event, which has happened, of Mr. Noad dying earlier, submitting that that points to a recognition by Mr. Miller and Mr. Vos that, were the annuities to the plaintiffs not raised in that circumstance, they could not have claimed full consideration for the benefits they received under the other deed. Thirdly, he points out that in cl. 2 of the deed, the persons to whom the payment has to be made are described as the " respective person or persons entitled " thereto." Fourthly, he points out that there is the provision that each annuity is to be paid exclusively out of income brought into charge for income tax and, lastly, he relies, and relies strongly, on the existence of the charge which I have read.

(1) [1944] Ch. 83.

It does not appear to me that those circumstances, either separately or taken together, are sufficient for his purpose. The fact that these annuities were provided for by this separate deed, is, in my view, an entirely colourless circumstance. It may be correct or not, to draw the conclusion which is sought to be drawn from the provision for the increase of the annuities, but, in my view, it is not a circumstance which can have any decisive effect on the matter. The use of the phrase " person " or persons entitled thereto " in cl. 2, is, I think, a loose use of the word " entitled." It is used there simply as a convenient way of describing those who are to receive the annuities, and is not of itself a decisive matter.

As regards the provision that each annuity is to be paid exclusively out of income brought into charge for income tax, one may speculate as to the reason for that clause, but I find nothing in it which can be used in favour of Mr. Stamp's argument.

Lastly, there is the question of the charge : Mr. Stamp sought to pray this in aid by pointing out that, by its language, the charge was, as he put it, at large, and that, taken in conjunction with the other circumstances which he put forward as internal evidence in the document, it showed that the intention was that the plaintiffs should be entitled to rely upon this charge if their annuities should not be paid, and that it therefore followed that, upon its true construction, the document did purport to grant a beneficial interest to these ladies. I am unable to share this view. The central function of a charge is to secure the performance of an obligation, and the charge is essentially ancillary. The obligation in this deed is the covenant of Mr. Miller and Mr. Vos, who are the persons by whom the charge is given, to pay the annuities in question, and I am unable to extract from the document any other result than that the charge is intended to stand as security for the performance of that obligation. Upon its true construction, I cannot find—and this is really admitted—that the deed confers upon any of the plaintiffs any right to sue, or anything more than a right to retain any sums which may from time to time be paid by Mr. Miller or Mr. Vos under the deed. In my view, the plaintiffs are not persons to whom the deed purports to grant something, or with whom some agreement or covenant is purported to be made, and, in these circumstances, the annuities are not annuities within the meaning I place upon the word as appearing in s. 2, sub-s. 1 (*d*) of the Finance Act, 1894.

Mr. Stamp has submitted that, upon the true construction of that sub-section, relating it to the facts of this case, and particularly praying in aid the definition of the expression "on the death" in s. 22, sub-s. 1, as including "at a period "ascertainable only by reference to the death," the case amounts to this, that what one is dealing with is a series of payments; that is, those payments which will actually, or may actually, be received by the ladies, and that the likelihood of the ladies receiving payments must be estimated, and a value placed on the interest so estimated upon which estate duty will be due. In my view, that argument is not sound, because, on the view which I take of the document, the payments, if and when made, will be no more than voluntary payments and, as such, appear to me to be quite outside the scope of the section. Therefore, I hold that the plaintiffs are not liable to estate duty in respect of the annuities.

As regards succession duty, I must refer to parts of ss. 1 and 2, of the Succession Duty Act, 1853. By s. 1, it is provided that: "The term 'Personal Property' . . . . shall include money "payable under any engagement." "The term 'Property' "alone shall include real property and personal property." By s. 2, it is provided that: "Every past or future disposition "of property, by reason whereof any person has or shall become "beneficially entitled to any property or the income thereof "upon the death of any person dying after the time appointed "for the commencement of this Act, either immediately or "after any interval, either certainly or contingently, and either "originally or by way of substitutive limitation, and every "devolution by law of any beneficial interest in property, or "the income thereof upon the death of any person dying after "the time appointed for the commencement of this Act, to "any other person, in possession or expectancy, shall be deemed "to have conferred or to confer on the person entitled by reason "of any such disposition or devolution a 'succession'."

It is clear that the annuities are property under s. 2, since they represent money payable under the engagement, namely, the deed. The material question, as it seems to me, is whether the plaintiffs became "beneficially entitled" to such property on the death of Mr. Noad. Nothing turns, to my mind, on the word "beneficially." If they became "entitled" to the annuities, they became entitled to them beneficially. The crucial question, therefore, is, did they become "entitled" to the annuities on Mr. Noad's death? The word "entitled," as used in

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this section, appears to me necessarily to carry the implication that for a person to be entitled to property under this section it must be capable of being postulated of him that he has a right to sue for and recover such property.

For the reasons which I have already given in discussing the question of estate duty, I am of the opinion that it cannot be said of the plaintiffs that, upon the death of Mr. Noad, they became "entitled to any property" within the meaning of that phrase as used in s. 2 of the Succession Duty Act, 1853, and, therefore, that the plaintiffs are not liable to succession duty in respect of the annuities.

Solicitors: *Blyth, Dutton & Co.; Solicitor of Inland Revenue.*

B. A. B.

COMBE *v.* SWAYTHLING (LORD).

WYNN-PARRY J.

1947

April 25.

Vendor and purchaser—Contract for sale—Payment of deposit to stakeholders—Dismissal of vendor's action for specific performance—Order on vendor to pay purchaser two-thirds of his taxed costs of action—Claim by purchaser to lien on property in suit for costs—Lien of purchaser for deposit and costs "if purchaser properly declines "to complete"—Basis of right to lien.

The conditions of sale of certain property provided that the purchaser should pay a deposit on the purchase money to the vendor's solicitors "as stakeholders." In the memorandum of agreement the vendor's solicitors were described as stakeholders and acknowledged receipt of the deposit. The contract went off otherwise than through the purchaser's default and an action by the vendor for specific performance was dismissed, the vendor being ordered to pay the purchaser two-thirds of the purchaser's taxed costs of the action. The purchaser could not, on his counterclaim, have sued for return of the deposit and a declaration of lien in respect of it.

On a claim by the purchaser for a lien on the property in suit for his costs:—

Held, (1.) that the basis of a purchaser's right to a lien for his deposit when the contract goes off otherwise than through his default is that he is to be regarded, in respect of the deposit, as a secured creditor: *Middleton* v. *Magnay* (1864) 2 H. & M. 233, *Turner* v. *Marriott* (1867) L. R. 3 Eq. 744, *Whitbread & Co.* v. *Watt* [1901] 1 Ch. 911; [1902] 1 Ch. 835, and *Kitton* v. *Hewitt* [1904] W. N. 21 considered;

(2.) that in the present case the purchaser, who could not on his counterclaim have sued for a return of the deposit which he had paid to the stakeholders or for a declaration of lien in respect of it, was not entitled to a lien for the costs of the action.

APPLICATION for lien for costs of action.

A vendor brought an action for specific performance of a contract for the sale of certain property to a purchaser for 28,000*l.* subject to special conditions of sale. The second condition provided that the deposit should be 10 per cent. of the purchase money and should be paid to the vendor's solicitors as stakeholders. The memorandum of agreement was a printed form. In it, the words " as agent for the vendor " and " as agent for the Settled Land Act trustees of the " vendor " were struck out. The words " as stakeholders " remained and were followed by the words " We acknowledge " the receipt of the above-mentioned deposit this 24th day of " June, 1946 : " and the memorandum was signed by the vendor's solicitors. The contract went off otherwise than through the purchaser's default and the action was dismissed, it being ordered that the vendor pay to the purchaser two-thirds of the purchaser's taxed costs of the action. The purchaser then claimed that he was entitled to a lien on the property in suit for those costs.

Upjohn K. C. and *Philip Sykes* for the purchaser. A purchaser who has paid money to a stakeholder is entitled, if the contract goes off through no fault of his, to a lien on the property to recover what he has paid. [They referred to *Rose* v. *Watson* (1), *Middleton* v. *Magnay* (2), *Turner* v. *Marriott* (3) and *Whitbread & Co.* v. *Watt* (4).] Here, the purchaser has advanced money—namely, a deposit on the purchase price—to the vendor and is entitled to a lien on the property for his costs: see Coote on Mortgages, 9th ed., p. 1379, and *Kitton* v. *Hewitt* (5). The lien is for the deposit and, in the event, for the costs of recovering it. It is not the purchaser's fault that he is here now: and he would never have been in the position in which he is but for the vendor's wrongful acts. The lien still attaches. It is not lost, for it is not through the purchaser's default that the contract has gone off and it is immaterial that the deposit was paid to stakeholders. [They referred to Seton on Judgments and Orders, 7th ed., vol. 3, at p. 2177 and Dart on Vendors and Purchasers, 8th ed., at p. 448.]

Harman K.C. and *Waite* for the vendor. The contention that it is immaterial that the deposit was paid to stakeholders is unsound. True, the stakeholders have no interest in the deposit : they merely hold it ; but the fact remains that it has been paid to them, not to the vendor. The vendor has never received it and it is not in his possession. Accordingly, action by the purchaser for its return certainly does not lie against the vendor. The purchaser could not obtain an order against the vendor for its return and, if the stakeholders defaulted, the vendor would not be responsible. [They referred to *Torrance* v. *Bolton* (1) and *Middleton* v. *Magnay* (2).] Thus, the vendor need not give a lien on the property for the deposit, since he has never received it. The point has never been decided and the court ought to hold that, as the deposit has been paid to stakeholders, the question of there being a lien does not arise.

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(1) (1864) 10 H. L. C. 672.

(2) (1864) 2 H. & M. 233.

(3) (1867) L. R. 3 Eq. 744.

(4) [1901] 1 Ch. 911 ; [1902] 1 Ch. 835.

(5) [1904] W. N. 21.

WYNN-PARRY J. The claim that the purchaser is entitled to a lien on the property for the two thirds of his taxed costs of the action, which I ordered the vendor to pay to him, raises the question whether a purchaser who has paid a deposit to a stakeholder can have a lien on the property for his costs of an unsuccessful action by the vendor for specific performance. That is an interesting question which, I think I am correct in saying, has not previously come before the court.

In support of the claim to a lien Mr. Upjohn, for the purchaser, relied on a principle which, he submitted, is supported by a number of authorities. That principle is conveniently set out in Coote on Mortgages, 9th ed., at p. 1379 in a passage which repeats a like statement, in an earlier edition, which Farwell J. approved in *Whitbread & Co.* v. *Watt* (3). The statement is as follows : " If a purchaser " advance all or any part of the money to the vendor, and the " contract is broken off, an implied contract arises, by which " the purchaser has a lien on the land ; and if the purchaser " properly declines to complete, he has a lien for the deposit " and interest on unpaid purchase-money, and for interest " on the payments, and also for the costs of a suit by himself " or the vendor to compel performance of the contract, and " this lien attaches on the deeds. If the purchase goes off " through the fault of the purchaser, of course he has no lien " for what he has paid."

It is to be observed that the opening words postulate the

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(1) (1872) L. R. 8 Ch. 118.

(2) 2 H. & M. 233.

(3) [1901] 1 Ch. 911.

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condition that "the purchaser advance all or any part of the "money to the vendor." In the present case the contract provides that the purchaser (the defendant) is the purchaser of the property from the vendor (the plaintiff) at the price of 28,000*l.* subject to the accompanying conditions of sale, the sum of 2,800*l.* having been paid to the vendor's solicitors as a deposit and in part payment of the purchase money; and the contract further provides by the second special condition that the deposit should be paid by the purchaser to the vendor's solicitors and held by them as stakeholders.

It is manifest in these circumstances that the payment of that sum of 2,800*l.* in accordance with that condition would, to that extent, discharge the purchaser. That does not mean, however, that, by his act in paying that sum to the vendor's solicitors, he paid it to the vendor. The purchaser could not have brought any proceedings against the vendor to obtain payment by the vendor to him of that sum. It is, in the light of these facts that I must examine the claim put forward for the purchaser by Mr. Upjohn and the applicability to this case of the statement which I have read from Coote on Mortgages.

The basis of the undoubted right of a purchaser, who has paid a deposit to a vendor, to a lien for his deposit if the contract goes off otherwise than through the purchaser's default is, in my judgment, that the purchaser is to be regarded, in respect of that deposit, as a secured creditor. That, in my view, emerges clearly from the speeches of Lord Westbury L.C. and Lord Cranworth in *Rose* v. *Watson* (1), in which case, be it observed, it was not claimed that the lien ought to extend to the costs of the suit. In the later authorities to which I have been referred, however—namely, *Middleton* v. *Magnay* (2), *Whitbread & Co.* v. *Watt* (3) and *Kitton* v. *Hewitt* (4)—it does appear that the purchaser's right, where the sale goes off otherwise than through his default, has been extended to cover, in such cases, his costs of suit and the costs of investigating title.

In my judgment all those cases are to be explained by reference to the underlying principle that the right of a purchaser to a lien in such circumstances is tested on the basis that he is to be regarded as a secured creditor. I cannot see how a purchaser has any right to a lien until it can be postulated of him that he is a secured creditor.

(1) 10 H. L. C. 672.

(2) 2 H. & M. 233.

(3) [1901] 1 Ch. 911; [1902] 1 Ch. 835.

(4) [1904] W. N. 21.

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It follows, therefore, in my judgment, that the purchaser in the present case—who could not, on his counterclaim, have sued for return of the deposit and for a declaration of lien in respect of it—is not entitled to a lien for his costs of this action. To hold otherwise would, in my judgment, be to introduce a new rule to support which the principle which underlies the authorities which have been cited to me and relied on by Mr. Upjohn for the purchaser could not be prayed in aid. I hold, accordingly, that the purchaser in the present case is not entitled to a lien for his costs.

[After discussion, his Lordship ordered that the vendor pay to the purchaser two thirds of his taxed costs of the action, excluding the costs of this application. Those costs would be the vendor's and there would be a set-off.]

Solicitors for the vendor: *Willis & Willis*.
Solicitors for the purchaser: *Gilbert Samuel & Co.*

K. R. A. H.

Followed. NOVELLO & Co. Ld. *v.* HINRICHSEN EDITION LD. [1951] 1 Ch. 595

FRANKFURTHER *v.* W. L. EXNER, LIMITED.

ROMER J.

1947

June 4, 5, 16, 17, 18, 19, 23.

International law—Austrian decree of 1938 *giving control of Jewish businesses to commissars—Penal law—Title to assets in England not affected.*

The plaintiff, a Jew, formerly resided in Vienna where he carried on a leather business. The defendants, an English company, dealt in leather and leather goods. In 1933 the defendants appointed the plaintiff as their agent in Austria. Pursuant to this agreement the defendants were accustomed to consign goods to the plaintiff in Vienna. These goods remained the property of the defendants, the plaintiff sending the purchase price to the defendants on a sale being effected. When things got difficult for Jews in Austria, the plaintiff started to remit funds to the defendants on account of the goods which had been consigned to him before any sale had been made. On March 10, 1938, German forces invaded Austria and Austria was incorporated in the German Reich, such incorporation being recognized by our Foreign Office. Jewish businesses were shortly afterwards placed in the hands of German state officials known as commissars. These commissars were appointed pursuant to the Austrian Decree 80 of April 13, 1938, which was entitled "Law as to the Appointment "of Official Administrators and Control Officers." That decree provided by s. 1 "For the protection of important public interests "the Reichsstatthalter is empowered to appoint official adminis-

"trators . . . . for undertakings having their head office in the "province of Austria." Section 2. "The official administrator "shall have full legal powers to act on behalf of the undertaking. "During the period of administration the authority of the "proprietor of the undertaking . . . . to act on behalf of the "undertaking shall be in abeyance." One S. was appointed commissar of the plaintiff's business and took complete control, the plaintiff in May, 1938, being arrested and imprisoned. On May 6, 1938, the plaintiff wrote a letter to the defendants informing them that his firm had been placed under the control of a commissar and stating that "No dealing with my credit balance "with you without the consent of S. will be legally binding." That letter was signed by the plaintiff and S. On May 10, 1938, the plaintiff had a credit balance with the defendants of 2,258*l.* 19*s.* 11*d.* Goods of the defendants of considerable value were on consignment with the plaintiff. S. got in touch with the defendants, who asked him to sell their goods then in Austria. S. from time to time sold the defendants goods on consignment in Austria but he did not remit the proceeds to the defendants. They on receipt of notices of sales debited the plaintiff's credit balance with the purchase price. In this action the plaintiff claimed payment of 2,258*l.* 19*s.* 11*d.*

Held, first, that, on its true construction, the Austrian Decree 80 was confiscatory in character and operation. Though not strictly penal, it was to be regarded in this country in the same way as a penal law. Secondly, that as between the commissars and the plaintiff our courts would not recognize the claim of S. to property in this country. *Luther* v. *Sagor & Co.* [1921] 3 K. B. 532 and *Lorentzen* v. *Lydden & Co., Ld.* [1942] 2 K. B. 202, considered.

ACTION.

Wilhelm Frankfurther, the plaintiff, was a Jew who had formerly resided in Austria, where, since 1931, he had carried on a leather business. His son Paul Frankfurther was his manager. The defendants, W. L. Exner, Ld., were an English company dealing in leather and leather goods of all descriptions. In December, 1933, the defendants appointed the plaintiff to be their agent for tanned skins and leather goods in Austria upon the following terms: (*a*) The plaintiff was to receive a 3 per cent. commission on the value of all direct and indirect sales of the defendants' goods in Austria, and all such sales were to pass through his hands; (*b*) The plaintiff was to guarantee payment for all goods of the defendants sold by him, whether as agent or on his own behalf; (*c*) the plaintiff was to pay all disbursements in respect of such goods from the time they left the defendants' premises in London; (*d*) in addition, the defendants were to forward from time to time to the plaintiff in Vienna free of all charges, such goods as it considered suitable for the plaintiff's market or as were recommended by the plaintiff, to be held by the plaintiff on consignment, to be disposed of by him on behalf of the defendants as opportunity offered. On all such sales the plaintiff was to be paid a commission of 3 per cent.

The greater part of the business carried on between the defendants and the plaintiff was what was called "consignment "business." The general arrangement was for the defendants to forward to the plaintiff goods accompanied by a pro forma invoice. These goods remained the property of the defendants until the plaintiff sold them, either to third parties or occasionally to himself, and either at the pro forma invoice price or at a reduced price authorized by the defendants. On the sale of the goods the plaintiff sent a sales invoice to the defendants and the defendants sent a definite invoice for the goods. The plaintiff then obtained permission from the Austrian authorities to remit money to the defendants in London on production of the invoice.

For the first years of the agency the plaintiff's account with the defendants generally showed a debit balance. Subsequently however, the plaintiff, when the position of Jews in Austria became uncertain, began to remit funds to the defendants before the goods were sold and he built up a substantial credit balance with the defendants.

On March 10, 1938, German forces invaded Austria and shortly afterwards Austria was incorporated in the German Reich, such incorporation being recognized on May 16, 1939, by the British Foreign Office. Almost immediately after the German entry into Austria, the German authorities put state officials known as "commissars" in charge of practically all Jewish businesses in Austria. One Schober was appointed commissar of the plaintiff's business and took possession of it in April, 1938, ousting the plaintiff from all control. Early in May, 1938, the plaintiff was arrested and imprisoned.

By a letter, dated May 5, 1938, the plaintiff wrote to the defendants as follows: "I beg to inform you that, as you may "have heard from my son, my firm has been placed under the "control of a commissar. No dealing with my credit balance "with you without the consent of Mr. Rudolf Schober, the "commissar, will be legally binding. For the time being "Mr. Paul Frankfurther is authorized to collect from you to "the debit of my account an amount not exceeding 20*l.* "Yours faithfully, Wilhelm Frankfurther." That letter was also signed by Schober. The plaintiff stated that he signed that letter under compulsion. Paul Frankfurther came to London early in May, 1938, and on May 10 he saw W. L. Exner, the defendant's manager, and was paid 20*l.* pursuant to the authorization in the letter. On May 10, 1938, the plaintiff's credit balance with the defendants was 2,258*l.* 19*s.* 11*d.* At that date the defendants had goods of substantial value on consignment with the plaintiff in Austria. Schober got into communication with the defendants, informing them that he had been entrusted by the authorities with the administration and management of the plaintiff's business, and he raised certain questions with regard to the plaintiff's credit balance with the defendants. On May 17, 1938, the defendants wrote to Schober asking him to use his best endeavours to realize the defendants' stock in Austria. Considerable correspondence passed between the defendants and Schober. The defendants' goods on consignment were, in fact, sold off by Schober but he did not remit the proceeds of sale to the defendants, with the exception of two sums of 129*l.* and 207*l.* respectively. When the defendants received advice of sales from Schober, they debited the amounts due in respect of the sales against the plaintiff's credit balance on their books. On the receipt in January, 1939, of the sum of 207*l.* the defendants closed their account with the plaintiff firm.

Schober's appointment as commissar was made pursuant to the Austrian Decree Number 80 issued on April 13, 1938. That decree was headed " Law as to the appointment of official " administrators and general officers." It provided by s. 1: " (1.) For the protection of important public interests, the " Reichsstathalter (Lord Lieutenant for the German Reich) " is empowered to appoint official administrators or official " control officers for undertakings having their head office in " the province of Austria. Such appointment is only per- " missible up to October 1st, 1938."—That time was subsequently extended by a later decree—" Administrators or control " officers appointed up to that date can continue their activities " after that date. (2.) Undertakings in the sense of this Law " shall also include the branches in Austria of foreign under- " takings. (3.) At the demand of the competent German " Reich Minister the measures provided in para. 1 can only be " taken in consultation with himself." By s. 2 (1.) " The " official administrator shall have full legal powers to act on " behalf of the undertaking. During the period of adminis-

"tration the authority of the proprietor of the undertaking ". . . . . to act on behalf of the undertaking, shall be in "abeyance." The law was signed by Nazi dignitaries, including Seyss-Inquart, and was promulgated by him as the Reichsstathalter of Austria.

In this action the plaintiff claimed, inter alia, payment of the sum of 2,258*l*. 19*s*. 11*d*., the balance standing to the credit of his account with the defendants on May 10, 1938.

Upjohn K.C. and *Raymond Walton* for the plaintiff. The Austrian Decree Number 80 had no extra-territorial operation and did not affect the plaintiff's title to his credit balance with the defendants. If, on its true construction, the decree was intended to operate outside Austria, it was a penal law and the courts of this country will not give effect to it: *In re Russian Bank for Foreign Trade* (1). The courts of this country will not recognize the confiscatory laws of a foreign country: *In re Ferdinand, Ex-Tsar of Bulgaria* (2).

Neil Lawson for the defendants. Three questions arise here: First, was Decree Number 80 a confiscatory law? Secondly, had it any extra-territorial effect? Thirdly, will the English courts enforce it? On its true construction Decree Number 80 was not confiscatory, it did not deprive the owner of his property in his goods but merely gave the commissar appointed under it sole power to act on the owner's behalf. He was in the position of a receiver. The appointment of the commissar will be recognized by the English courts as giving authority to act on behalf of the business in question: *Lepage* v. *San Paulo Coffee Estates, Co.* (3); *Lorentzen* v. *Lydden & Co., Ld.* (4). If, on the other hand, the decree was confiscatory, the English courts will enforce it applying the principle of the comity of nations: *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (5); *Banco de Bilbao* v. *Sancha* (6). The comity of nations requires the English courts to give effect to the decrees of a foreign government which has been recognized by our government. There is no principle that the English courts will not give effect to confiscatory legislature of a foreign government. Such legislature is not in the same position as penal legislation: see the observations of Scrutton L.J. in *Luther* v. *Sagor* (7). This decree was not a penal law. The appointment of a commissar was not made in respect of any offence. The decision of the Supreme Court of the United States in *United States* v. *Belmont* (1) shows that that court considered it should recognize title to property founded on an expropriatory decree.

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(1) [1933] Ch. 745.
(2) [1921] 1 Ch. 107.
(3) [1917] W. N. 216.
(4) [1942] 2 K. B. 202.
(5) [1937] Ch. 513.
(6) [1938] 2 K. B. 176.
(7) [1921] 3 K. B. 532, 557, 558.

ROMER J. [stated the facts, and continued :] On the above outline of the facts various questions arise, and I propose first to consider the effect of Schober's appointment as commissar. In relation to Decree Number 80 the first question is : "Was "it intended to be extra-territorial, or was it intended to be "confined in its scope to Austrian territory ?"

The decree itself is silent on the point. Dr. Bretsch who was called by the plaintiff, said that Decree Number 80 was not a provision of private law, but was an administrative decree having no extra-territorial effect. Dr. Rinesch, on the other hand, who was called by the defendants, and who had practised in Vienna subsequently to 1938, said that Decree Number 80 is a private law, in that it deals with the rights of persons in relation to their property, and that from the Austrian point of view it would have extra-territorial effect.

In the view that I take of the matter it is not necessary for me to arrive at a definite conclusion upon this matter one way or the other, and I do not intend to go further into the evidence which those gentlemen gave upon that point. I have no doubt that the Nazis intended to cast their net as wide as they could, and it emerges, I think, from a confidential inter-departmental document which the Germans circulated, that they themselves did take the view that Decree Number 80 would operate, or at all events they hoped it would operate, outside Austrian territory. Moreover, it is a little difficult to see how the commissar could function efficiently if the decree was not extra-territorial, at all events, in relation to businesses which had foreign branches. Be that as it may, I am satisfied, myself, that this decree was confiscatory in character and operation. It is said that even though the decree was preparatory to expropriation, that is to say, that it was paving the way to expropriation, it was not confiscatory in itself, but that its object was to enable the German government to take any steps required for the economy and political security of Austria ; that it was not directed solely against the Jews ; that it did not deprive a proprietor of his property but only of his power

(1) (1937) 301 U. S. 324.

of disposition over it; that it did not divest a man of his business or property and vest it in the commissar; nor did it affect property outside the business assets; and finally it was said, and said truly, that the commissar allowed something like 1,000*l.* in reichmarks to be paid to the plaintiff's wife at the instance of Mr. Hammerman. Dr. Rinesch said that during the period of the administration by a commissar the rights of a proprietor would be quiescent, but would arise again after its cessation. During the time of the administration the proprietor, he said, could not act for the business. He said that confiscation was the practice in cases of Jewish firms, but that it did not appear on the face of the decree. The object of the law, he said, was to enable, in practice, Hitler's regime to take over businesses which did not conform to his views, and he agreed that the decree deprived a proprietor of the use of his property and of its beneficial enjoyment. He said that generally speaking the law was applied to all Jewish firms in Austria, and also to some others as well, namely, socialist, communist and catholic enterprises.

Commissars had already been appointed of socialist and communist concerns under the Schuschnigg regime, but these had to go when Hitler arrived, and new commissars to take their place were appointed under this Decree Number 80. On the face of it the decree bears a semblance of innocence, but when one sees vague phrases such as " for the protection of important " public interests," and " carrying on the businesses adminis- " tered in a manner consonant with the public interest," one is entitled to inquire what manner of legislation it really was, and, for this purpose, to see what was done under it. We know what happened to the plaintiff. He told me about it in his evidence. Jail, deprivation of any voice in the conduct of his business, and appropriation of its assets without compensation, followed ultimately by permission to leave the country with nothing left to him but his life, his clothing and some furniture. Dr. Bretsch said that by Austrian law the commissar could not, in any possible sense, be regarded as an agent for the plaintiff. He said that Schober was the statutory agent appointed by the state to act on his behalf. " The important public interests " in the decree were regarded by the executive as being the elimination of the Jews, and the " public interests " referred to in s. 3 were interpreted as being the Nazi interests. Now, it is quite true that the Nazis did not openly and unashamedly steal the property of the Jews by decrees clearly and unambiguously worded, until later on, and from November, 1938, onwards a series of laws was passed for the purpose; but, if the expulsion by the state of a man both from the direction and the beneficial ownership of his business without compensation, coupled with the transfer of control to the state, for the benefit of the state, is not confiscation within the ordinary usage of that word, it is difficult to know what is.

Mr. Lawson cited some authority for the purpose of showing that what happened under this decree was not confiscation. He referred me to the case of *Lepage* v. *San Paulo Coffee Estates, Co.* (1), but I think the only point that emerged from that decision really was that the English court recognized the title conferred upon the French official during the first world war who filled very much the position of the Custodian of Enemy Property in this country. I do not think any question of confiscation emerged from the case, or was argued. Then he referred me to the case of *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (2), and there again, I do not think any question of confiscation of property arose. It was a case where a liquidator was appointed by a government which was recognized by His Majesty as being the Government of Ethiopia, and all that Clauson J. (as he then was), who decided that case, did was to recognize the validity of the appointment, and no questions such as I have to deal with here emerged in that case. Neither of those decisions in my view is any authority governing the circumstances of this case, and, in my judgment, this decree is confiscatory legislation.

Mr. Lawson then said that, even if the legislation must be regarded as confiscatory, our courts will recognize the decree and enforce it here, having regard to His Majesty's recognition of the Hitler regime as the governing power in Austria, and that such recognition has retroactive effect.

It is true that the legislation in Decree Number 80 was not penal in the sense which was laid down by the Privy Council in the case of *Huntingdon* v. *Attrill* (3), a case which was decided at a time when our courts had not become as much accustomed as they have since become to governments of civilized communities expropriating the property of whole sections of their people without compensation. But confiscatory laws of this character, though not strictly penal in the sense laid down by the Judicial Committee of the Privy Council,

(1) [1917] W. N. 216.

(2) [1937] Ch. 513.

(3) [1893] A. C. 150.

or recognized and defined by the Judicial Committee, are regarded here in the same light as penal laws, as many cases show. There are numerous authorities, and it will not be necessary for me to deal with them, or more than a few of them, but the general principle which our courts apply in relation to penal laws was laid down many years ago in the case of *Folliott* v. *Ogden* (1), and I only want to read one passage from the judgment of Lord Loughborough C.J., who delivered the judgment of the court. He said (2): "The penal laws of "foreign countries are strictly local, and affect nothing more "than they can reach, and can be seized by virtue of their "authority: a fugitive who passes hither, comes with all his "transitory rights; he may recover money held for his use, "stock, obligations and the like; and cannot be affected in "this country, by proceedings against him in that which he has "left, beyond the limits of which such proceedings do not "extend." The principle was recognized by Younger L.J., as he then was, in the case of *In re Ferdinand, Ex-Tsar of Bulgaria* (3), and again, by Maugham J., as he then was, who decided the case of *In re Russian Bank for Foreign Trade* (4). That was one of the cases where it was sought to wind up a Russian bank. The petitioner claimed to be a creditor for over 23,000*l*. Expert evidence was given, and the view was expressed that the bank had ceased to exist as a result of decrees made under the laws of the Union of Socialist Soviet Republics, which decrees had transferred its assets to the Soviet Government, and that payment could not be demanded from any person or body of persons. Maugham J., after pointing out that the Soviet legislation was not in terms extra-territorial, said (5): "The Soviet Government does not iself "assert that the nationalization decrees have an extra-"territorial effect"; and, dealing with the matter which I am considering at the present moment, he said (6): "If the "debt"—that is to say, the petitioner's debt—"was primarily "recoverable in London, I am of opinion that it was not "affected by the Soviet legislation, even though it was due to a "person who was a Russian subject at the date of the nationali-"zation decrees. Its locality must be taken to be the place "where the debt was in the ordinary course recoverable."

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(1) (1789) 1 H. Bl. 123.
(2) Ibid. 135.
(3) [1921] 1 Ch. 107, 144.
(4) [1933] Ch. 745.
(5) Ibid. 759.
(6) Ibid. 767.

Then he referred to certain authorities, and he said (1): "The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. This follows, I think, from the decisions of Hill J. and the Court of Appeal in *The Jupiter* (*No.* 3) (2). It is interesting to note that the same view is taken by the R.S.F.S.R. itself in a circular dated April 12, 1922, and in a circular issued by the People's Commissariat of Justice to all Districts Courts dated September 26, 1923, which are set out in the elaborate judgment of Hill J. above referred to. These circulars show that the Soviet Government does not regard the nationalizing decrees as having any extra-territorial effect even as against Russian citizens. Moreover, it is evident that our courts have never entertained the view that a debt incurred here by a foreign corporation permitted to carry on business here under English law can be discharged by a foreign statute." Then he refers, as an example of that, to the case of *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (3), and he says (4): "It may be observed that the decrees of the Russian legislature in relation to insurance companies were on the same lines as those in relation to private banking companies at any rate to this extent, that the insurance businesses in Russia were nationalized so that the assets of such companies, so far as Russian statutes could effect such a result, were transferred to the Russian State. In the Court of Appeal Sargant L.J., in his judgment, observed as follows (5): 'Nor do I think that the position of creditors here as against property of the Rossia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which "nationalized" the undertaking and assets of the Rossia Insurance Company, that is, as I understand it, purported to transfer these assets from their private proprietors to the Russian nation as a whole. Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here; see Dicey, Conflict of Laws,

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(1) [1933] Ch. 767.

(2) [1927] P. 122, 144, 145, 250.

(3) [1926] 1 K. B. 1; [1927] A. C. 95.

(4) [1933] Ch. 745, 767, 768.

(5) [1926] 1 K. B. 1, 15.

" ' 2nd ed., p. 310, and *Lecouturier* v. *Rey* (1), an analogous " ' case with reference to the goodwill of a trade mark or trade " ' name in England.' This view was plainly concurred in by " Bankes L.J., in the same case, and it must also have been " accepted as correct in the House of Lords."

In the case of *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* (2), which arose out of the confiscation of the property of King Alfonso by decree, Lawrence J. had to consider the substance of the right sought to be enforced, and whether its enforcement would directly or indirectly involve the execution of a penal law of a foreign state. He came to the conclusion that it would directly or indirectly involve the execution of a foreign penal law, and that the plaintiff's claim failed.

Then there was the case of *Lorentzen* v. *Lydden and Co., Ld.* (3), where Atkinson J. considered in some detail the question of the confiscatory character of legislation. The headnote to that case was this: " The Norwegian Government made a " decree by which all ships registered in Norway and situated " outside the area in Norway occupied by an enemy power, " and owned by (inter alia) a company carrying on business " in that area, were requisitioned by the Norwegian " Government, and the Norwegian Minister of Shipping, who " was in the decree called ' curator,' was given power to take " over ships under construction outside the occupied area, and " he was stated to be entitled to collect claims belonging to the " owners, and to enforce such claims by action. The decree " provided for compensation to be given for what had been " taken under the decree. Acting under the powers conferred " by that decree the curator brought an action on behalf of the " owners of the steamship *Tempo*, who were a company carrying on business in Oslo, against the defendants, a firm carrying " on business in London, to recover damages for breach by them " of a contract to charter the steamship *Tempo* for the carriage " of goods from Oslo to Leith. The defendants by their defence " denied that the curator had any right or title to collect claims " belonging to the owners of the steamship *Tempo* or to enforce " the alleged claims, and said that the Norwegian Government " could not by any legislative or executive act transfer the title " to claims or other property situated in England. The issue " as to the title of the curator to sue was ordered to be tried as a " preliminary point. *Held*, that the decree, not being of a

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(1) [1910] A. C. 262.

(2) [1935] 1 K. B. 140.

(3) [1942] 2 K. B. 202.

"confiscatory character, had an extra-territorial effect and "operated to pass the ownership of the chose in action which "was situate in England to the curator appointed by the "Norwegian Government, and that therefore the curator was "entitled to maintain the action."—It is to be observed that the reason why the learned judge came to the conclusion that the decree was not of a confiscatory character was because of art. 5 of the decree, which expressly provided for compensation for that which would be taken over pursuant to the order. Atkinson J., after pointing out that "the situs of a debt or chose "in action is, generally speaking, the country in which the "debtor is to be found and sued" (1), and after referring to the *Russian Bank* case which I have just mentioned, said with regard to the judgment of Maugham J. on the point (2): "It is impossible to construe that passage as laying down a "general rule of law. The learned judge was dealing with "Soviet confiscatory legislation, and with the effect of decrees "which did not purport to have extra-territorial effect. I cannot "regard his decision as one governing the effect on a chose in "action in this country of a decree which is not confiscatory "and which in terms purports to deal with, and deal only with, "extra-territorial property. Therefore, it seems to me that "there is no authority which has been cited to me which prevents me from giving effect to this decree." Then he sums the matter up by saying (3): "It seems to me that the English "courts are entitled to take into consideration the following "matters: that this is not a confiscatory decree, see art. 5 of "the decree, that England and Norway are engaged together "in a desperate war for their existence, and that public policy "demands that effect should be given to this decree. To "suggest that the English courts have no power to give effect to "a decree making over to the Norwegian Government ships "under construction in this country seems to me to be almost "shocking. At any rate, where the dictates of policy are so "plain, it seems to me that following that judgment and the "judgments referred to therein I am entitled to give effect to "this decree. It is not confiscatory, it is in the interests of "public policy, and it is in accordance with the comity of "nations. Therefore I determine this issue in favour of the "plaintiff. Before I leave it, I would like to refer to the last "case which has been decided on the point, the case of *Banco*

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(1) [1942] 2 K. B. 205.

(2) Ibid. 212.

(3) Ibid. 215.

"*de Vizcaya* v. *Don Alfonso de Borbon y Austria* (1)." Then he set out the facts and the decision, and he said (2): "It was "held that the defendant was entitled to retain them. Why? "—because the legislation was penal in character. It was on a "par with confiscatory legislation."

Then I was referred to the case of *A. M. Luther* v. *James Sagor & Co.* (3), a decision of the Court of Appeal, where Bankes L.J. referred to the fact that the Russian legislation which was there in question must be recognized, this being necessitated by the recognition by His Majesty's Government of the provisional government of Russia as the then existing government of Russia, a fact, apparently, which was brought out between the hearing in the court of first instance and the hearing in the Court of Appeal. Then he said (3): "Under "these circumstances the whole aspect of the case is changed, "and it becomes necessary to consider matters which were not "material in the court below. The first is a question of law of "very considerable importance—namely, what is the effect of "the recognition by His Majesty's Government in April, 1921, "of the Soviet Government as the de facto government of "Russia upon the past acts of that government, and how far "back, if at all, does that recognition extend. The second is a "question of fact, whether sufficient evidence was given to "establish the identity of the Soviet Government now "recognized by His Majesty's Government with the govern- "ment which seized and confiscated and sold the appellants' "goods."—That point arose, putting it shortly, out of the fact that property, which had been seized under the decree, of a Russian subject in Russia, was subsequently sold and sent to this country and claimed by the true owners in the courts of this country. Bankes L.J. said (4): "The government of this "country having, to use the language just quoted, recognized "the Soviet Government as the Government really in possession "of the powers of sovereignty in Russia, the acts of that "Government must be treated by the courts of this country "with all the respect due to the acts of a duly recognized foreign "state." Then he said this (5): "It is necessary now to "deal with the point made by the respondents, that the decree "of confiscation of June, 1918, even if made by the Government "which is now recognized by His Majesty's Government, as

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(1) [1935] 1 K. B. 140.
(2) [1942] 2 K. B. 202, 216.
(3) [1921] 3 K. B. 532, 541.
(4) Ibid. 543.
(5) Ibid. 545.

"the de facto government of Russia, is in its nature so immoral, "and so contrary to the principles of justice as recognized by "this country, that the courts of this country ought not to "pay any attention to it. This is a bold proposition. The "question before the court is not one in which the assistance "of the court is asked to enforce the law of some foreign "country to which legitimate objection might be taken, as in "*Hope* v. *Hope* (1) and *Kaufman* v. *Gerson* (2). The question "before the court is as to the title to goods lying in a foreign "country which a subject of that country, being the owner of "them by the law of that country, has sold under an f.o.b. "contract for export to this country. The court is asked to "ignore the law of the foreign country under which the vendor "acquired his title, and to lend its assistance to prevent the "purchaser dealing with the goods. I do not think that any "authority can be produced to support the contention." Then he dealt with a certain case, and he said (3): "The "respondents' position is rendered all the more difficult from "the fact that the vendor in the present case is a duly "recognized sovereign state whose law conferred the title "which is challenged. Even if it was open to the courts of this "country to consider the morality or justice of the decree of "June, 1918, I do not see how the courts could treat this "particular decree otherwise than as the expression by the de "facto government of a civilized country of a policy which it "considered to be in the best interest of that country." Warrington L.J., expressed himself much to the same effect, and he said (4): "It is well settled that the validity of the acts "of an independent sovereign government in relation to "property and persons within its jurisdiction cannot be "questioned in the courts of this country." Scrutton L.J., expressed himself in this way, upon which Mr. Lawson placed some reliance; he said (5): "It remains to consider the "argument that the English courts should refuse to recognize "the Soviet legislation, and titles derived under it as confiscatory and unjust. This was based on the general principle "stated by Mr. Dicey in his work on the Conflict of Laws "(2nd ed. (1908), p. 33), 'English courts will not enforce a "'right otherwise duly acquired under the law of a foreign "'country. . . . (B.) where the enforcement of such right

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(1) (1857) 8 De G. M. & G. 731.

(2) [1904] 1 K. B. 591.

(3) [1921] 3 K. B. 532, 546.

(4) Ibid. 548.

(5) Ibid. 557.

" 'is inconsistent with the policy of English law, or with the " 'moral rules upheld by English law, or with the maintenance " 'of English political institutions.' When this is expanded "later in the same work (p. 36) the only head applicable "to this case is (Inconsistency with) '*Morality*,' that is, as "supported by English courts. There are very few instances "in which this principle has been applied." Then he referred to one or two cases, and then he said (1): "But it appears a "serious breach of international comity, if a state is recognized "as a sovereign independent state, to postulate that its legis-"lation is 'contrary to essential principles of justice and " 'morality.' Such an allegation might well with a susceptible "foreign government become a casus belli; and should, in my "view, be the action of the Sovereign through his ministers, "and not of the judges . . . ."

Then there was the case of *Princess Paley Olga* v. *Weisz and Others* (2), which was, to all intents and purposes, to the same effect as the case of *A. M. Luther* v. *James Sagor & Co.* (3).

Then finally, I was referred to the case of the *United States* v. *Belmont* (4), a decision of the Supreme Court. I do not propose to go through that in detail, because it seems to me that it was a very special case. It was a case where a debt owing in New York to a Russian national came within the scope of the operation of the Soviet confiscatory legislation. It was assigned, together with other property, by the Soviet Republic to the United States Government, such assignment forming part of an international compact between the two governments. The two judgments, the majority judgment and the minority judgment, both held that notwithstanding any state law or policy the assignment must be recognized as valid. Both judgments were at pains to point out that they were not dealing with any question of beneficial ownership, and nothing is to be found in either of the judgments which would cast the least doubt upon the rule, which as far as I know is as much observed in America as in this country, that foreign penal legislation or confiscatory legislation will not, in general, be enforced so far as regards property within the jurisdiction of the courts which are asked to enforce it. I think it is a special case in this sense, that the whole thing formed part of an international bargain between the United States and the Soviet Republic, and the decision was largely founded upon the conclusion, as was stated

(1) [1921] 3 K. B. 558.

(2) [1929] 1 K. B. 718.

(3) [1921] 3 K. B. 532.

(4) 301 U. S. 324.

in the majority judgment, that no state policy can prevail against an international compact such as was there involved.

Having dealt with those authorities, it seems to me that their application arises in the following way: On the assumption that Decree Number 80 had extra-territorial effect, it was said that Schober became entitled under that decree to the credit balance in London standing in the books of the defendants, and to sue for it in the plaintiff's name in London. That being so, the defendants say that they were entitled and bound to accept Schober's direction as to what to do with the balance, and they acted on his directions by setting off the balance against the proceeds of their goods sold by Schober in Vienna, and they accordingly discharged themselves of the credit balance. It does not appear to me that any of the authorities to which I have been referred gives the least support to this view. They all show that, as between Schober and the plaintiff, our courts would not recognize or enforce the claims of Schober under Decree Number 80 to the property in question here. It is true that our courts would recognize Schober's title to property in Austria acquired by virtue of the decree, or his rights of control in relation to that property, conferred by that decree, even though such property was subsequently transferred over here; but, in my judgment, Schober would appeal in vain to the courts of this country to assist him in establishing his claim to property which was, and always had been, situate within the jurisdiction.

Having arrived at that conclusion I would merely say that it would appear (although I do not rely upon it as the case is not even reported but only shortly mentioned), that Simonds J., as he then was, took a view of the German decree passed in relation to the Sudetenland similar to that which I have expressed: see *Bohm* v. *Czerny* (1); but, as I say, I do not place reliance on it because the facts do not appear, and I do not know what precise form the decree took which the learned judge had there to consider.

I have gone into this, because it was elaborately argued, but it seems to me that a shorter way of dealing with the point and arriving at the same result, is to say that there is no shadow of evidence which has been adduced before me, either oral or in any document, that is evidence against the plaintiff, that Schober ever did give any directions at all to the defendants to allocate the balance in the way that they did, and, failing evidence of

(1) (1940) 190 L. T. Jo. 54.

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such directions, the defendants' case based upon such directions obviously loses its foundation.

[The judge proceeded to review the evidence on this point which does not require further report.]

Judgment for the plaintiff.

Solicitors: *Slaughter & May; Edward Betteley Smith & Stirling.*

B. A. B.

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Mar. 17, 18, 19.

Vendor and purchaser—Sale of land—Oral contract—Payment of deposit—Repudiation by vendor—Action by purchaser for specific performance—Receipt as "memorandum or note"—Omission of material term—Material term for benefit of both parties—Power to waive term—"Importance" of material term—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40, *sub-s.* 1.

In July, 1945, the defendant, who inhabited a house with an orchard called Oakdene, was introduced by a friend to the plaintiff, a market gardener and fruit-buyer living in a nearby village. The plaintiff and the defendant thereupon agreed for the sale to the plaintiff of the defendant's fruit and one or other of them suggested that she should sell also Oakdene to him for 1,000*l.* At that time they did not come to any agreement concerning Oakdene, but in January, 1946, the friend told the plaintiff that the defendant would probably sell it for 1,000*l.* On January 31 the parties met at Oakdene in the presence of the defendant's daughter: the plaintiff wrote a cheque for 100*l.* as deposit (which was endorsed by the defendant and ultimately paid to her credit): and the defendant signed across a twopenny stamp a receipt in the following form: "Received of [plaintiff] . . . . one hundred pounds being deposit on bungalow and ground named Oakdene." In subsequent correspondence between the parties' respective solicitors the term that vacant possession should be given and completion be had on March 30 was stressed as an important part of the arrangement. The defendant having repudiated, the plaintiff brought an action for specific performance, alleging the oral contract of January 31, 1946, and the receipt as evidence of it. The evidence given during the hearing showed that the transaction of January 31, 1946, included a term that possession should be given on March 30 of the orchard in particular, but as to the house the defendant should be allowed to remain in occupation for one or two months thereafter if she should so desire:—

"sold for £1000" v. [illegible]

Held, in dismissing the action on the ground that there was no sufficient memorandum or note to satisfy s. 40, sub-s. 1, of the Law of Property Act, 1925,

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(1.) that the agreement included the term as to vacant possession, which was material; (2.) that that term could not be regarded as "a stipulation of no great importance and solely benefiting the "plaintiff" within the meaning of those words as used in Fry on Specific Performance, 6th ed., at p. 243, n., but was, and was intended, for the benefit of both parties. *North* v. *Loomes* [1919] 1 Ch. 378 distinguished. Observations on the parallel passage in Williams on Vendor and Purchaser, 4th ed., vol 1, at pp. 4 and 5, which does not suggest that a stipulation which a plaintiff can waive or to which he can submit must be "of no great "importance"; (3.) that neither the plaintiff nor the defendant could have waived the term on the ground that it was exclusively for his or her benefit; and that it was a substantial and material part of the bargain and was not merely collateral to it; (4.) that a memorandum omitting a material term of the bargain does not comply with s. 40, sub-s. 1, of the Law of Property Act, 1925, subject to the qualification that, if a term is exclusively for the benefit of one party, that party may sometimes waive it and enforce the contract even though the memorandum contain no evidence of that term. *Johnson* v. *Humphrey* (1946) 174 L. T. 324, considered and followed.

Semble—without determining at what point a term ceases to be "of importance" so that there need not be a note of it—if a term really is an essential part of the bargain there must be some memorandum of it.

WITNESS ACTION.

This was an action, brought by an alleged purchaser, for specific performance of a contract for the sale to the plaintiff of a house and grounds known as Oakdene, Station Road, Stoke Mandeville, Buckingham. The question for determination was whether on the facts the plaintiff could prove an enforceable bargain having regard to s. 40, sub-s. 1, of the Law of Property Act, 1925. Oakdene was a one-storied house with a fruit garden or orchard. At all material times the defendant lived in Oakdene with her daughter and son-in-law and their daughter, who was nearly seven years old at the date of this action. The defendant was seventy-four years old and was suffering from pernicious anæmia, which made her sometimes unalert and forgetful and sometimes testy and difficult, and at all times impeded her physical movement. The plaintiff, a market gardener and fruit-buyer living in a nearby village, was unknown to the defendant until July, 1945, when he was introduced to her by a Mrs. Ward, an old friend of the defendant and of her family, with a view to the defendant's selling her growing fruit to the plaintiff. A bargain was thereupon struck with regard to the fruit. At the same time, either the plaintiff or the defendant made a suggestion with regard to the sale of the bungalow Oakdene itself. The plaintiff said that he was and would be content to buy it if the defendant wished to sell it, and that he would pay 1,000*l.* for it: but no bargain was then made with regard to that. In January, 1946, Mrs. Ward told the plaintiff that she had the strongest ground for believing that the defendant was willing to sell the bungalow to him for 1,000*l.* On the afternoon of January 31, 1946, Mrs. Ward and the plaintiff went over to the bungalow, an interview took place between the plaintiff, the defendant and Mrs. Ward and the plaintiff said that the proper course was for him to pay a deposit. He drew a cheque for 100*l.* in favour of the defendant who endorsed it and gave it to Mrs. Ward. The latter took it, a day or two later, to the defendant's solicitor and told him what had happened. He had advised the defendant not to sell but, for nearly three weeks, took no steps to protect her, simply presenting the cheque and paying the amount into her account in his office. The plaintiff wished to obtain some evidence in writing of the bargain and suggested that Mrs. Ward should write and the defendant sign a receipt for the 100*l.* Mrs. Ward suggested that her own daughter should write it because her handwriting was good. Miss Ward accordingly wrote out " Received of Mr. Harold Hawkins, 20 Brook Street, " Aston Clinton, Bucks., the sum of one hundred pounds, " being deposit on bungalow and ground named Oakdene, " Station Road, Stoke Mandeville, Bucks., sold for one thousand " pounds." There followed the defendant's signature over a twopenny stamp and the date " 31.1.46," the necessary stamp duty being later affixed under penalty. About a week after the date of the interview the plaintiff's solicitors wrote to the defendant's solicitors " We act for Mr. Hawkins, who has agreed " to purchase this property," i.e., Oakdene, " with vacant " possession on March 30." That was the first letter: and each time that a letter was written the term that on March 30 vacant possession should be given and completion be had was regarded as an important part of the arrangement. Eventually the alleged contract was repudiated by or on behalf of the defendant, and on March 21, 1946, the writ was issued. In the statement of claim it was alleged that " it was orally agreed between " the plaintiff and the defendant that the defendant would " sell and the plaintiff would buy . . . . Oakdene . . . . " for . . . .1,000*l.*" That, according to the statement of claim, was all: but at the trial another term emerged as part

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of the bargain. In examination in chief the plaintiff said "After the defendant had stated that she would be going to "the public institution, Tyndal House, i.e., the workhouse, "I said, to be quite sure, when would she want to go out? "She said she had paid the rates and taxes to the end of "March and she would like to have the benefit of those. I gave "her the option of stopping on until April or May, so long as "I could get into the garden" (meaning take possession of the orchard) "in order to trim the fruit trees by the end of March "and then, should she not go on March 31, leave me possession "of the garden. I asked her whether that was long enough, "and she said 'Yes'." The plaintiff said also that, when he was introduced to the defendant in July, 1945, and the suggestion about the sale of Oakdene was made, the defendant asked him not to tell her daughter about the suggestion, and that he wanted the house not for his own occupation, but for that of a foreman. In cross-examination, the plaintiff said that the bargain was that possession should be given on March 30, particularly with regard to the garden, subject to the defendant's being entitled to remain on in the bungalow for one or two months longer if she wished. That that was an important term of the arrangement was quite plain from the correspondence. There was, however, no suggestion that her daughter or her daughter's family should so remain or should be entitled so to remain. At the hearing of the action, the defendant's recollection of the meeting between herself and the plaintiff on January 31, 1946, seemed entirely to have evaporated. She did not deny her signature to the two documents: but she said that she had no recollection whatever of signing them or, indeed, of seeing the plaintiff, either on January 31, 1946, or on any other day between the meeting in July, 1945, and the first day of this action. It was not suggested that either the defendant's daughter or her daughter's husband was present when the contract was alleged to have been made. It was, however, plain that they were anxious in their own interests to establish, if they could, that the defendant had never made the contract. Moreover, it was possible, having regard to the evidence of her health at the material times, that by the date of the hearing the matter had passed out of her mind. Her doctor was seeing her constantly during the period in question, among the dates on which he visited her being January 30, 1946 (the day before that of the alleged contract) and February 3, 4, 6, 8 and 11. He said in evidence that he was in constant attendance on her at the time because she was suffering from a somewhat bad phase in the disease of pernicious anæmia; and on other evidence it was likely that she was at the time suffering from bronchitis also, or from some similar complaint. Her friend, Mrs. Ward, apparently knew neither of the doctor's visits nor of the state of the defendant's health. On the evidence, the defendant was sometimes depressed at this period: and she herself said, in evidence, that she sometimes did say to friends that "one day she would have to go to "the workhouse." The evidence showed that she thought that money affairs were pressing on her and that, partly because of that phase of her illness, she came to the conclusion—which she told to Mrs. Ward but apparently not to her own daughter living in the bungalow—that she would close with the plaintiff and accept the price of 1,000*l.* The defence made various attempts to set up the view that there was an interest in the nature of a statutory tenancy which prevented vacant possession from being given in any event. The alleged statutory tenant was the defendant's daughter. That ground and others were suggested for the view that the alleged contract must be treated as having fallen through. The defence by para. 1 denied that the oral agreement as alleged in para. 1 of the statement of claim was made. Paragraph 2 of the defence was "If . . . . "an oral agreement was entered into between the plaintiff "and the defendant on January 31, 1946, for the sale of "Oakdene . . . . such agreement was subject to the . . . . "express conditions . . . . that the plaintiff should find for "the defendant suitable alternative accommodation before "March 30, 1946, unless the defendant should find such alter-"native accommodation prior to the said date, and the defen-"dant should be in the position of being able to give the plaintiff "vacant possession on March 30, 1946." The second alleged condition adumbrated the suggested statutory tenancy on the part of the daughter and the son-in-law: and in para. 3 of the defence it was pleaded that neither condition was complied with. The conditions as so pleaded were not proved, and there was no condition as to finding alternative accommodation. Paragraph 5 of the defence set up in general terms s. 40 of the Law of Property Act, 1925. The subsequent paragraphs, which were added by amendment, indicated further defences in the form of alleged mistake, and intimated a defence of non est factum based on the state of the defendant's health.

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Fawell for the plaintiff. In the circumstances the court ought to grant specific performance. True, in the statement of claim is alleged a contract which does not include the added term as to possession, nor is that term mentioned in the receipt. The receipt is, however, a "memorandum or note" sufficient to satisfy the statute in respect of the contract which is in fact pleaded. All that has happened is that, in the course of the plaintiff's evidence during the hearing, it has transpired that there is a term which is part of the contract but which has not been pleaded. That the receipt does not mention the term is immaterial, for it is a term mostly—if not, indeed, entirely—for the plaintiff's benefit. For, although it is the defendant who is to benefit by being allowed to stay on for two further months if she so wishes, it is the plaintiff who is to benefit by getting possession of the orchard at once—i.e., on March 30—and so being able properly to look after the fruit. Thus, he gets much more out of the additional term than the defendant does, and so can waive it altogether if he wishes to do so: see Fry on Specific Performance, 6th ed., at p. 243 n., and Williams on Vendor and Purchaser, 4th ed., vol. 1, at pp. 4 and 5; and be it added that Williams does not postulate, as does Fry, that the condition, to be waivable by the party for whose benefit or to whose detriment it enures, ought to be "of no great "importance." The passage in Fry is supported by the citation of *North* v. *Loomes* (1), wherein the analogous term was as to the payment of costs, which term Younger J. held to be not important enough to be worth recording. In that case, as in this, the document relied on was not itself a contract but was simply evidence of one: and, even if the alleged additional term in the present case cannot be described, on any view, as being "a stipulation of no great importance," as Fry has it, the significant fact that Williams says nothing of the kind is in the plaintiff's favour. *North* v. *Loomes* (1) is an authority in support of the plaintiff, as, also, is the earlier case of *Martin* v. *Pycroft* (2). There, the plaintiff sued for specific performance of a contract contained in a document which was itself, and was intended to be, the actual agreement and not merely evidence thereof. The agreement was for the grant of a sub-lease, and the plaintiff sought a decree of specific performance of it, admitting that he had agreed also—as the written agreement did not show—to pay a premium of 200*l.* and offering in his statement of claim to pay it. It was the defendants themselves who actually alleged this term and who, on the plaintiff's consenting to be bound by it, contended that the agreement, as it omitted that term, did not satisfy the statute. Parker V.-C., upheld that contention: the Court of Appeal however, did not, and reversed his decision, taking the view that the additional term did not render the Statute of Frauds a valid defence to the claim. This case is on all fours with that, and the court ought to hold that the statute is not a valid defence here. In *Allsop* v. *Orchard* (1) specific performance was refused on the ground that the real agreement—as against the one put forward—was for the sale of the property in question excluding three acres which had not been defined: the term of exclusion could not be waived, notwithstanding the plaintiff's readiness to do so and to transfer all the land, because the contract on which the plaintiff sued had not been proved. In the present case the contract is amply proved, and there is no ground for excluding waiver. In *Johnson* v. *Humphrey* (2), the court had to decide whether the memorandum did not contain or refer to a term which was part of the agreement proved: and Roxburgh J. held that the memorandum could not be sufficient to comply with the statute because it omitted a material term of the bargain. That decision is correct and is satisfactory as far as it goes: but the case could just as soundly have been decided the same way on the equally adequate ground that there too, as in *Allsop* v. *Orchard* (1), a contract had not been proved; and further, it would appear that the learned judge did not have the assistance of the citation of any authorities, either of the relevant passages in Fry and Williams or of any of the cases, including *North* v. *Loomes* (3) and so did not consider the question of waiver of a term, whether "important" or otherwise. Here the defendant has outstayed the two months of extended possession accorded to her and the only obstacle to the fulfilment of the contract is her own repudiation of it. She cannot properly be allowed herself to plead and rely on the added term and at the same time to contend that the plaintiff is remediless for lack of a sufficient memorandum or note of that term. Moreover, the defendant has not specifically pleaded that there is not a memorandum or note of the contract inclusive of the added term, but has pleaded the statute generally in answer to the contract alleged in the statement of claim. If, therefore, the contract is correctly pleaded in the statement of claim, it must follow that the signed receipt is a memorandum or note of it. The defence starts by denying that the oral contract was ever made at all and then goes on to say that, if it was, it was subject to the condition, among others, that the defendant should be in the position of being able to give the plaintiff vacant possession on March 30, 1946. That, at best, is not very lucid: and the court will not, in all the circumstances, allow the defendant to substitute for it, by way of amendment, the additional term—which, be it remembered, came to light in the plaintiff's evidence, not in hers—and then to preclude the plaintiff from proceeding on the ground that the memorandum or note gives no evidence of that term.

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(1) [1919] 1 Ch. 378.

(2) (1852) 2 De G. M. & G. 785.

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(1) [1923] 1 Ch. 323.

(2) (1946) 174 L. T. 324.

(3) [1919] 1 Ch. 378.

Seuffert for the defendant. The plaintiff has alleged an oral agreement and the onus of proving it is therefore on him. Even on the whole of the evidence there has not been proved an agreement whereof the signed receipt is a memorandum or note satisfying the statute. [He referred to *Stimson* v. *Gray* (1), *Wood* v. *Midgley* (2) and *Martin* v. *Pycroft* (3).] The only other question is whether the court, if it be against the defendant on the statute, ought to exercise its jurisdiction in equity by granting a decree of specific performance. At all material times the defendant was—as she is now—in bad health which had an adverse effect on her mental alertness. She will suffer far more if a decree of specific performance be granted than the plaintiff will if it be refused. Finally, the defendant herself asked that her daughter be not told of the project for sale, which shows that she herself must have felt that there was something untoward about it and, therefore, that she could not have felt quite certain that she really desired it. The case is, therefore, pre-eminently one in which the court ought not to decree specific performance.

Fawell replied.

EVERSHED J. stated the facts and held that it was an important term of the contract that the defendant should be entitled to remain in occupation for a month or two after March 30, 1946, if she wished. His Lordship then continued as follows:

The first matter which I have to determine is this. I have held that the agreement was not in the form pleaded in para. 1 of the statement of claim, but in that form together with the added term as to possession, which added term clearly involves, in my view, also the question of completion. Mr. Fawell, for the plaintiff, contended that that term, although neither pleaded nor evidenced in the receipt, does not adversely affect the plaintiff's rights in the action, because it is a term substantially, if not, indeed, exclusively, for the plaintiff's benefit, which he is, therefore, entitled to waive. Having waived the term, it is contended, he can sue without it on the agreement which, thus shortened, is sufficiently evidenced by the receipt. It is further contended that in the events which have happened the term about possession on March 30, or possibly during April or May, has ceased to have any practical significance (all those months being long passed), not through any fault of the plaintiff but because the defendant repudiated the contract: so that to allow the defendant now to set up this oral term and then to say that the plaintiff's rights were defeated because there was no sufficient memorandum to satisfy the statute would be to allow the statute to defeat what justice demanded and so, in effect, to be used as an instrument of fraud. Further, it is contended that, on a proper view of the defence the plea of the statute in any case is not raised with regard to this matter, that all that the defence has done has been to plead the statute generally in answer to the agreement which the plaintiff pleads and that, if the agreement was as the plaintiff pleaded it, the statute is satisfied because all the terms in para. 1 of the statement of claim are evidenced in the receipt. Finally, it is contended that it would be contrary to principle and to the practice of the court to allow amendment of para. 2 of the defence by substituting for the plea of the vague condition about the defendant's being able to give vacant possession, an allegation of an additional term of the character proved by the plaintiff and then to enable the defendant to say that that term is not evidenced by any memorandum in writing to satisfy the statute.

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(1) [1929] 1 Ch. 629.
(2) (1854) 5 De G. M. & G. 41.
(3) 2 De G. M. & G. 785.

Those arguments are formidable, especially when reference is made to the authorities to which Mr. Fawell has drawn my attention. As I have indicated, however, I conclude that the plaintiff cannot succeed because he fails to satisfy what the statute—which, in my judgment, has been sufficiently pleaded—requires him to satisfy, namely, that the agreement on which he sues, or which he seeks to prove, has been evidenced in writing in accordance with the statute. Indeed, he is, in my view, on the horns of a dilemma. If he relies strictly on his pleading, he has not proved the contract which he has alleged, because the contract with the term added is, in my view, substantially different from that which he has alleged. If, however, he were entitled, notwithstanding the plea, to set up some other contract and then waive one of its terms, the general plea of the statute would, in my view, be an answer.

The agreement on which the action is brought is the one which the plaintiff and the defendant made and which, as I have held, comprises the terms set out in para. 1 of the statement of claim and the term as to possession which, in my view, was material. That is the agreement. It is one and indivisible. Can it be said that there is a note or memorandum of it in writing?

That question raises the further question, is it necessary that every term of the parol agreement be so evidenced? There is, quite clearly, authority that, generally speaking, it is necessary. The memorandum however, need not refer to matters which the law implies and which, I assume, would not in terms be part of the bargain struck. But whether they would be or not, an implied term such as that the vendor must make a good title has not to be noted in the writing. It is said, however, that there is a further exception, and it is the scope of that exception with which I am concerned and which raises the difficulty in this case. The matter is stated as follows in Fry on Specific Performance, 6th ed., at p. 243 n. "It would seem, however, that where a "stipulation of no great importance and solely benefiting the "plaintiff is omitted from the memorandum, the defendant "will not, in an action for specific performance, in which the "stipulation is not asserted against him, be allowed to set up "that the memorandum is insufficient by reason of such "omission to satisfy the statute, if the plaintiff chooses to "waive the stipulation." In support of that, *North* v. *Loomes* (1), decided by Younger J., is cited. The same point is dealt with in Williams on Vendor and Purchaser, 4th ed., vol. 1, at pp. 4 and 5, where the material sentence is: "It "appears, however, that if a stipulation, which is to the "detriment or for the benefit of one of the parties exclusively, "is omitted from the memorandum, that party may submit to "perform it or waive the benefit of it (as the case may require), "and may with such submission or waiver specifically enforce "the contract as stated in the memorandum. But this excep"tion does not apply where no agreement at all has been "actually concluded."

Clearly the two text books differ, in that Fry, but not

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(1) [1919] 1 Ch. 378.

Williams, states that not only must this stipulation be exclusively for the benefit or to the detriment of one party or the other, but also it ought to be of no great importance. Nothing in Williams suggests that the stipulation which a plaintiff can waive or to which he can submit must be of no great importance. I am most anxious not to try, in this case, to lay down general principles unnecessary for the decision: but, as the matter has developed, it is incumbent on me to express a view—not intended as an exhaustive definition—of the scope of the exception, such as it is.

First, I wish to preface what I have to say by observing that, in my view, there may well be a difference between cases, on the one hand, in which the memorandum is the contract or purports to be a record of it, and cases, on the other hand, where the contract sued on is oral and the question is whether some document such as a receipt for a deposit—which does not on the face of it purport to be an agreement—sufficiently satisfies the statute. I say that for this reason. In *Martin* v. *Pycroft* (1) the question arose with regard to an agreement to grant a sub-lease. The plaintiff sued for specific performance. The written document relied on was plainly and obviously intended to be an agreement. So described and expressed, it was on the face of it an exhaustive written agreement. The defendants alleged that it was part of the arrangement—although, as the document was construed by the court, it was not in writing—that the plaintiff should pay them a premium of 200*l*. for the sub-lease. The plaintiff assented, submitted to pay the 200*l*. and contended that, so submitting, he was entitled to specific performance. Parker V.-C., however, would not grant it, on the ground that the Statute of Frauds was a fatal obstacle to the plaintiff. In the Court of Appeal, Knight Bruce L.J., delivering the judgment of the court, took the different view that, where, in circumstances such as were proved in that case, a plaintiff submitted to be bound by a term solely for the defendants' benefit, it would be contrary to all proper principles to allow the defendants to resist specific performance by setting up the added term for their own benefit to which the plaintiff had assented.

In *North* v. *Loomes* (2), on the other hand, the agreement was a parol agreement that North should sell certain premises to Loomes for 590*l*., the written memorandum which was relied on being the following receipt: "Received of Mr. Joseph

(1) 2 De G. M. & G. 785. (2) [1919] 1 Ch. 378.

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"Goddard Loomes the sum of fifty pounds deposit on the "purchase price five hundred and ninety pounds (590*l.*) for the "house and premises and land in the occupation of Mr. R. "Keene, situate in the High Street, Chinnor, and known as "Holmleigh. The balance of the purchase price to be paid on "or before March 25, 1918. Purchase price, 590*l.*; Deposit "50*l.*; Balance 540*l.* (Sgd.) Frederick J. North," and there was a date. It was alleged that the bargain included also a term—not directly referable to the sale in the sense of affecting the title, the price, the right to possession, or any other matter directly referable to the property—that the purchaser should pay his own costs and those of the vendor. True, that term may be said to have affected the purchase price indirectly. It was not, however, directly pertinent to the sale of the land or to the title, but, rather, was collateral thereto. The purchaser's obligation to pay those costs had been stoutly denied. During the negotiations for the conveyance there had been correspondence, the purchaser had repudiated the bargain and the vendor had brought the action. The purchaser thereupon proceeded to set up as a defence the very term which he had repudiated—his obligation to pay costs—and then stated that, since that term was not in the memorandum, the plaintiff (the vendor) was defeated by the statute. I say "proceeded "to set up." The defence, however, as presented, did not, in terms, so plead the matter at all: and, accordingly, for that defence to be open to the defendant, it was necessary to amend the defence in order to plead it. The learned judge refused, not unnaturally, to allow the amendment. He did, however, say that, even if the amendment was made, or if, on the defence as it stood, the defendant could plead the additional term, nevertheless, since the term was one—and here is the qualification referred to in Fry—of insufficient importance to be referred to in the document (namely, the receipt), and was exclusively for the benefit of the party suing (namely, the vendor, North) the vendor would be entitled to waive his right to have all the costs paid and to sue on the agreement as recorded in the deposit receipt, which referred to the terms important enough to be recorded in the document.

As I have indicated, in *North* v. *Loomes* (1) as in the present case, the document relied on did not purport to be an agreement and, therefore, might not fairly be expected to have to contain every term to which the parties agreed. Where, however the document is not on the face of it an agreement which would be expected to contain every term, it must contain at least—and, so far, I think, *North* v. *Loomes* (1) raises no difficulty—every term which is, as has been said, material—every important term—of the contract for sale.

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If I apply the principle in *North* v. *Loomes* (1)—and I do not overlook the final paragraph in the judgment, referring to *Martin* v. *Pycroft* (2), which was added by the learned judge after he had written the earlier part and after he had used the phrase "of sufficient importance"—there are obviously, in my view, certain marked distinctions. First, it was held in *North* v. *Loomes* (1) that the provision about paying the costs could not be regarded as of sufficient importance to be worth recording: but, in my judgment, that observation could not fairly be applied to the term about vacant possession which the parties agreed in this case. On that, I need recall only the correspondence from the plaintiff's solicitors, to which I have already referred. As soon as they wrote, the one term to which they did refer and which they emphasized was this term about vacant possession on March 30. They, at any rate, regarded it as obviously important and I assume that they acted on their client's instructions. Secondly, I am far from satisfied that that term can be described as one exclusively for the benefit of the plaintiff. The date fixed—March 30 or 31, on which nothing turns—was two months ahead and, had there not been an agreement about possession or completion, a reasonable time might well have expired on a date not greatly different from March 30. It has to be remembered, however, what were the circumstances with regard to the defendant, her daughter and her son-in-law as the plaintiff stated them. The plaintiff, so far as personally concerned, wished to acquire the house for the occupation, not of himself, but of a foreman: and he was particularly anxious to get possession of the garden so as to be able to attend to the fruit trees not later than the end of March. Bearing all those circumstances in mind—apart from the obvious importance of there being something fixed about completion—the term, in my view, was, and was intended for the benefit of both parties. The plaintiff was anxious to secure possession of the garden—and, possibly, of the house—by March 31, but was willing to concede to the defendant the right to remain in occupation of the house for two more months. In my view, therefore, this is not a case in which one party or

(1) [1919] 1 Ch. 378. (2) 2 De G. M. & G. 785.

the other could, in any circumstances, have waived the term on the ground that it was solely for his or her benefit. I think, therefore, that, without travelling further into the detail of the cases to which I have referred, it is enough—and it is, perhaps, prudent to confine it to this extent—to say that this term was of real importance so as to be a substantial and material part of the bargain, not merely collateral to it, and was, further, not a term exclusively for the benefit of either party—certainly not a term exclusively for the benefit of the plaintiff or a term which he would be entitled to waive.

As I have indicated, importance may or may not be an essential element in these cases, according as the court accepts the statement in Williams on the one hand, or that in Fry on the other. My own view—so far as I must state it—is that, if the term is really a substantial part of the bargain and is to that extent material, then, unless there is a note or memorandum of it, prima facie the plaintiff must fail to establish that there is, within s. 40, sub-s. 1, of the Law of Property Act, 1925, a note or memorandum of the agreement, the note or memorandum being of some agreement which is materially different from, or is not, the agreement sued on.

In *Allsop* v. *Orchard* (1) the alleged agreement was contained in letters. The plaintiff sued for specific performance and pleaded that the agreement was, on its proper construction, for the sale of the rectory and all the glebe land and set up that agreement. The learned judge held, however, that the true agreement—if, indeed, there was any final agreement—was different, because there should have been (and, as I follow it, he so construed the relevant documents) an exclusion from the glebe land of three acres which had not been defined. The plaintiff sought to waive any exclusion and was willing to transfer all the glebe land, but it was held that there was no room for the doctrine of waiver because the plaintiff had failed altogether to prove the existence of the contract which he sought to establish.

In *Johnson* v. *Humphrey* (2), also, which was decided by Roxburgh J., an oral bargain was alleged and a memorandum, set out in the report, was made on the day following the bargain. The question, similar in some respects to that in the case before me, was whether the bargain proved contained a term which was not, or was not referred to, in the memorandum. On that the learned judge declared himself " satisfied that one of the

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(1) [1923] 1 Ch. 323.

(2) 174 L. T. 324.

"terms to which the plaintiff and the defendant agreed on "November 9 was that vacant possession should not be given "until the defendant could make other suitable arrangements "for herself and her furniture." Later he said: "If there was a "term agreed to by both parties on November 9 that the lady "should give vacant possession when she could make other "suitable arrangements for herself and her furniture, the "memorandum does not contain all the terms of the bargain "because it does not contain that term. It leaves the matter "as a big query." The learned judge then quoted from the memorandum, which was dated on the following day, and continued: "But it does not say when possession is to be "given; therefore, plainly, it does not include all the terms of "the bargain, if I am right in holding, as I do hold, that one of "the terms related to the giving of vacant possession. Nor do "I think it matters precisely what that term was and whether "or not it was too vague to be enforceable. If the term was "too vague to be enforceable in a court of law, it would only "mean there was no contract, and, therefore, there would "be no memorandum of it. Therefore, in my judgment, once "I reach the conclusion, which I do, that there was a term "about vacant possession agreed to on November 9, the "memorandum signed by the defendant on November 10 "cannot be a memorandum sufficient to comply with s. 40 of "the Law of Property Act, 1925, because it omits a material "term of the bargain."

No doubt it is true, as Mr. Fawell, for the plaintiff, contended, that that decision may be rested on another ground, namely, that there was no real bargain at all: and true, also, as Mr. Fawell adds, that, apparently, none of the cases—particularly *North* v. *Loomes* (1)—was cited to the learned judge. There is, however, to my mind, no doubt that he is there affirming, as a proposition of law, that the memorandum, if it omits a material term of the bargain, fails to comply with s. 40 of the Law of Property Act, 1925. In my judgment, that proposition is, in general, correct, with, no doubt, the qualification that, if a term is exclusively for the benefit of one party, that party may sometimes waive the benefit of it and sue on the contract for enforcement, even though the memorandum contain no evidence of that term. I say "may "sometimes," because I do not want to lay down any principle on the question whether the term must be of importance or

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material. I have indicated that my own view is that, if the term is really an essential part of the bargain, there must be some memorandum of it: but I make no attempt to determine at what point a term ceases to be of importance so that there need not be a note of it. Subject to the qualification which I have mentioned, I see no ground to doubt the correctness of Roxburgh J.'s decision in *Johnson* v. *Humphrey* (1).

As I have indicated, this point, which is one of some difficulty, is open to the defendant in her defence. I conclude, therefore, that the plaintiff has not proved the contract which he sought to prove, and that he can prove only a contract to which there is the fatal objection that it is insufficiently recorded in the receipt. The action therefore fails.

In the circumstances, clearly I need not determine whether specific performance would have been granted. In case the matter goes further, however, it is, perhaps, right to say that I am not satisfied, at the moment, that it ought to be granted, even with the concession which the plaintiff thought fit to make. I have referred to various circumstances, including the defendant's health, which must, I think, have been manifest to a stranger. I do, however, express the view that the conduct of a young man—as the plaintiff is—in calling on an old lady of seventy-four and obtaining from her under conditions somewhat of secrecy—I refer to the stipulation made during the original conversation that her daughter should not be informed—an agreement for the sale of the house in which she is living is a matter which the court will view somewhat strictly. I observe, however, in fairness to the plaintiff, that I have no doubt whatever that he acted in perfect good faith. I see no reason to disbelieve anything that he said in the witness box and, no doubt, he relied on Mrs. Ward's presence, she being, and representing herself to be, a friend of the defendant. The plaintiff was able to satisfy his own conscience with the reflection that Mrs. Ward was there as the defendant's friend and that he was entitled to rely on her. Even so, however, I am not altogether happy about this method of transacting business, and I am not, therefore, entirely satisfied that I would have decreed specific performance the result of which would inevitably have been that the defendant, an old lady of seventy-four, might have had to spend her last days in the workhouse. While I express that doubt, however, I note also that the trial of this action has taken considerable time and that its length has been considerably increased by reason of the numerous defences raised or indicated. The plea that there was some mistake, the plea or suggestion of non est factum—all of them have made it necessary to go into these matters and to protract the trial and thereby to increase the costs. As I have indicated, those who advised the defendant in the first place were, in my view, rather slow to disturb themselves with regard to her interests. Clearly the pleader was in great difficulty when it came to framing the defence, but it is quite plain to me, after seeing the defendant in the witness box, that there was no difficulty in making her hear or understand the questions which were put to her. In my view, it is not fair that the plaintiff, who fails on the point with regard to the statute, should be bound to pay the much-increased costs caused by matters having no relation to that point. In the circumstances, the proper order for me to make in dismissing the action is that the plaintiff pay only one-half of the defendant's taxed costs.

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(1) 174 L. T. 324.

Action dismissed.

Solicitors: *Kirby, Millett & Ayscough, for Horwood & James, Aylesbury; Pyke, Franklin & Gould, for Parrott & Coales, Aylesbury.*

K. R. A. H.

ECCLES v. BRYANT

VAISEY J.
1947
April 22; May 19.

Vendor and purchaser—Negotiations "subject to contract"—Terms of formal contract settled by parties' solicitors—Vendors sign one part—Purchaser subsequently signs his part—No formal exchange—Contract binding when purchaser posts his part of contract.

Negotiations, which were conducted throughout on the basis of being subject to contract, were begun in April, 1946, for the sale to the plaintiff of certain freehold premises the property of the defendants. By early June the parties' solicitors had finally agreed the terms of the contract for sale. On June 11 the defendants' solicitors wrote to the purchaser's solicitors: "Our "clients have now signed their part of the contract herein and "we are ready to exchange and shall be glad to hear from you." The plaintiff's solicitors acknowledged that letter stating that they were obtaining their client's signature to the contract and that they would forward their client's part of the contract in due course. On June 17, the defendants' solicitors were informed on the telephone that the plaintiff had signed his part of the contract. On June 18 before 5.30 p.m. the plaintiff's solicitors posted to the defendants' solicitors a letter enclosing the contract signed by the plaintiff, which reached the defendants' solicitors on June 19. That letter crossed a letter from the defendants' solicitors, also posted on June 18, to the plaintiff's solicitors, in which they stated that the defendants had decided not to proceed with the sale and had disposed of the property elsewhere. The plaintiff alleged that a binding contract for sale of the premises existed and claimed specific performance :—

Held, that the parties' solicitors had authority to agree any reasonable procedure for making the two parts of the contract, which had been signed, finally binding. No formal or other physical exchange was essential. The defendants' signature of their part of the contract, coupled with their solicitors' letter of June 11, 1946, was an offer and the plaintiff's signature of his part of the contract, coupled with his solicitors' letter of June 18, was an acceptance of that offer. Such acceptance took effect when it was posted on June 18 and, accordingly, the defendants' repudiation, which only became operative when it reached the plaintiff on June 19, was too late. The plaintiff was entitled to specific performance.

Keppel v. *Wheeler* [1927] 1 K. B. 577, and *Spottiswoode, Ballantyne & Co., Ld.* v. *Doreen Appliances, Ld.* [1942] 2 K. B. 32 considered and explained.

WITNESS ACTION.

In this action, Stephen Henry Eccles sought specific performance of an alleged contract for the sale to him by the defendants Norman Frederick Bryant and Charles Stewart Pollock, of a freehold dwelling-house and land known as Barns Branford, situate at Horne in Surrey.

The following statement of facts is taken substantially from his Lordship's judgment. Negotiations for the sale of the property were begun in April, 1946, and were protracted by reason chiefly of the plaintiff's misgivings on a number of points. These negotiations were conducted on the basis of being "subject to contract." By early June, 1946, a draft contract had been agreed and finally settled between the parties' solicitors. On June 11, the defendants' solicitors, who practised at East Grinstead, wrote to the plaintiff's solicitors, who practised in London, as follows : "Bryant & Pollock to Eccles : re Barns "Branford. Our clients have now signed their part of the "contract herein and we are ready to exchange and shall be "glad to hear from you." In a postscript it was explained that one of the defendants had signed the contract for himself and his co-vendor ; no question arose as to his right to do so. The part of the contract so signed was in the form agreed and settled. The plaintiff's solicitors reply to that letter was dated June 14, it said: "We thank you for your letter of "the 11th instant and are obtaining our client's signature to "the contract herein . . . . We will forward our client's "part of the contract in due course." At no times did the defendants' solicitors object to or dissent from the plaintiff's solicitors' proposal for "forwarding" the plaintiff's part of the contract nor did they suggest an appointment for a formal exchange. On the next day, June 15, the defendants' solicitors wrote to the plaintiff's solicitors: "We have your letter of the "14th instant . . . . We must repeat that, if the matter is "to go through, contracts must be exchanged immediately, "and it must be completed by the 24th instant, which means "that it has to be dealt with quickly."

That letter reached the plaintiff's solicitors on Monday, June 17, and on the morning of that day a conversation took place on the telephone between representatives of the two firms of solicitors. The plaintiff's solicitors' managing clerk, Mr. Smith, gave evidence but no evidence of the other party to the conversation was given. Mr. Smith said "I informed them"—that is the defendants' solicitors—"on the 17th on the "telephone that the contract had been signed by Mr. Eccles." He later read out from his diary a note made at the time as follows: "On receipt of the letter from" the defendants' solicitors "attending them on the telephone with regard "to their suggestion that the matter must be completed by "June 24, pointing out that this was clearly impracticable and "informing them that we had the contract signed." He was then asked in cross-examination this question: "They were "pressing to have the contract, were they not?" to which he answered "Yes." And in re-examination he was asked: "In the course of the conversation nothing was said about any "withdrawal on the part of the defendants?" to which he answered "No." On the following day, June 18, the plaintiff's solicitors, after referring to the Monday's telephone conversation, and to a question about the reinstatement of certain damage as to which there had been discussions, wrote as follows to the defendants' solicitors: "We enclose herewith the contract "signed by our client, and shall be glad to receive in exchange "the part signed by your clients." This letter was posted in London before 5.30 on the Tuesday afternoon, and reached the defendants' solicitors in course of post on the morning of the 19th. It crossed in the post a letter from the defendants' solicitors also dated June 18, in the following terms: "With "reference to your telephone call yesterday, we are instructed "to inform you that our clients have decided not to proceed "with the sale to your client, owing to the delay which has "occurred on your client's part in dealing with the matter. "They have accordingly disposed of the property elsewhere."

In fact, the defendants, five days later, that is on June 24, entered into a contract to sell the property at an enhanced price to a Miss Edmonds, and the property was subsequently conveyed to her. In the meantime, however, the plaintiff had caused his contract or alleged contract to be registered as an "estate contract," thereby giving Miss Edmonds notice of it.

Fox-Andrews K.C. and *Ronald E. Hopkins* for the plaintiff. A binding contract arose here when the plaintiff's solicitors posted their letter of June 18 enclosing the plaintiff's part of the contract duly signed. That constituted an acceptance of the defendants' offer. The correspondence shows that the plaintiff's solicitors had agreed that there should be no formal exchange.

Neville Gray K.C. and *H. A. Rose* for the defendants. Where there is a formal contract the parts of the contract must be both signed and exchanged. At no stage in the negotiations did the parties'solicitors agree that there should be no exchange. Indeed, it is not clear that the defendants' solicitors could agree to waive an exchange. The strict practice is for the parties' solicitors to meet and formally exchange the contracts. It is, however, very usual for the parties to exchange by post. If there is no formal exchange, a contract is not binding until both parts of the contract are received. If the plaintiff had sent his part of the contract, the defendants would have sent theirs and a binding contract would have arisen when the plaintiff received the defendant's part of the contract, or, possibly, when the defendants put their part in the post. There is no exchange when one party to a contract says his part is ready and the other party posts his. Until exchange the matter remains in negotiation. This appears from the observations of Bankes L.J. and Sargant L.J. in *Keppel* v. *Wheeler* (1) and of Lord Greene M.R. in *Spottiswoode, Ballantyne & Co., Ld.* v. *Doreen Appliances, Ld.* (2).

Fox-Andrews K.C. in reply. In the authorities what is meant by exchange is not discussed. Exchange does not mean a physical handing over of a document, it means making the

(1) [1927] 1 K. B. 577, 584, 593. (2) [1942] 2 K. B. 32, 34.

document effective vis-à-vis the defendant. The question is whether what was done was effective to carry out the intention. In *Spottiswoode, Ballantyne & Co., Ld.* v. *Doreen Appliances, Ld.* (1), Lord Greene M.R. did not intend to say that any party can go back on his bargain until there has been a physical exchange. He referred to *Wilson* v. *Balfour* (2).

Cur. adv. vult.

May 19. VAISEY J. read the following judgment. This is a purchaser's action for the specific performance of a contract, or alleged contract, and, alternatively, for damages for the breach thereof. The contract, if contract there be, is for the sale by the defendants to the plaintiff at the price of 6,000*l.*, of a freehold house and some eleven acres of land known as Barns Branford at Horne in the county of Surrey. Stated briefly, the point which I have to decide is whether, in the circumstances of this particular case, a document signed in duplicate by the plaintiff and the defendants (the fact that it had been so signed having been communicated by the parties to each other) has become binding upon them as a contract notwithstanding that there has been no physical exchange of the two duplicates between them.

Before I come to the facts of the case, I desire to make a few general observations on this matter of " exchanging " contracts. Plainly there is no real analogy between the delivery of a deed, as a sequel to its being signed and sealed, and the exchange of the two parts of a contract. For a deed never becomes operative until it is delivered, whereas in regard to many contracts or memoranda of contracts, no question of any exchange can arise—where, for example, there is but one writing signed by both parties, or where both are represented by the same solicitor. The practice of a physical exchange of contracts at a pre-arranged time and place is, no doubt, a very common and convenient one, though probably this ceremonial proceeding is less frequent in these days of short staffs than it formerly was. When it is adopted, the intention of the parties may usually be inferred to be to make the critical moment of the actual formation of the contract the moment when the two documents are passed across the table. It is more difficult, I think, to discover such critical moment when the exchange is effected by post. In that, and indeed, in every case, the intention

(1) [1942] 2 K. B. 32, 34. (2) (1929) 45 T. L. R. 625.

has to be ascertained from the words or conduct of the parties. Suppose, for example, one of the parties says to the other: "I have signed my part of the contract; will you please now "sign your part and post it to me?"; and suppose the other party does so, and the first mentioned party, having received the other's part signed, repents him of his bargain and repudiates the transaction, is it too late for him to do so? That is not unlike what has happened in the present case.

His Lordship stated the facts set out above, and continued:

Now what intention has to be imputed to the parties in regard to the question of the means by which, and the moment at which, they were to pass from negotiation and to become finally and irrevocably bound in contract? It was suggested to me that the solicitors had no authority to arrange for anything except an "exchange," but whether it is suggested that the exchange must be what I have called "ceremonial," or could be effected by post, I am not sure. In my view, the solicitors had ample authority to arrange for any reasonable procedure; that is, either a ceremonial exchange, or an exchange by post, or an exchange such as, in my opinion, was in point of fact carried out. Reading the letters, and considering the telephonic conversation to which I have called attention, I think that what the defendants' solicitors in fact said was: "We have signed our part of the contract, so that, if you sign "your part and post it to us, the matter will be in order." Or the matter may be put thus: As every contract must be resolved into an offer and acceptance, the defendants' signature plus the letter of June 11 was an offer, and the plaintiff's signature plus the letter (from his solicitors) of June 18, was an acceptance. If so, such acceptance took effect on the evening of the 18th (see *In re Imperial Land Company of Marseilles, Harris'* case (1) and *Henthorn* v. *Fraser* (2)) and the defendants' repudiation, which took effect when it was communicated to the plaintiff on the morning of the 19th (see *Henthorn* v. *Fraser* (2)), was too late. On these grounds, I think the plaintiff must succeed.

I must, however, refer to certain reported cases to which my attention was drawn. Speaking generally of these authorities, I would say that most, if not all, of the references which they contain to a contract being "signed and exchanged" only mean that it is, or has to be, "signed and made binding," that is, not necessarily by a physical exchange, but by any other method which the parties may decide to adopt. Of such alternative methods examples could be given: the parties might, for instance, arrange to have the two parts of the contract deposited with a third party, for example, at a bank; or there might be a mutual undertaking to exchange; or they might agree to dispense with the ceremony altogether, for example, where the same solicitor is acting for both or where they have agreed that they are to be effectively bound by their mere signatures. While an exchange of contracts is usual, it is in no sense essential, and there is nothing in the authorities to say that it is.

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(1) (1872) L. R. 7 Ch. 587. (2) [1892] 2 Ch. 27.

I will now refer shortly to the cases. In *Phillips* v. *Edwards* (1), the headnote is as follows: "The doctrine of "part performance of a parol agreement is not to be extended "by the court, and it is inapplicable to a case where a trustee "has a power to lease, at the request in writing of a married "woman, which has not been made. Land was vested in a "trustee for the separate use of Mrs. E., a married woman, "and the deed gave the trustee a power to lease at the "request in writing of Mrs. E. The trustee and Mrs. E. "agreed, by parol, to let the property to the plaintiffs, and a "lease was prepared, approved of and executed by the trustee "and by Mrs. E.; but before their solicitor had parted with it "and before the plaintiffs had executed it, Mrs. E. recalled her "assent to it. She had made no request to the trustee 'in "'writing'—*Held*, that there was no contract binding on "Mrs. E. and no part performance, and that the plaintiffs "could not enforce the agreement."

I will read the passage in the judgment to which my attention was called (2): "The consequence is, that in every way of "looking at it it comes round to the same question, and the "full extent of it is this: What is the effect of a parol agree-"ment to lease a plot of land, followed by the approval, on "both sides, of the draft lease, and by the execution of the "indenture of demise itself by the lessor, but countermanded "by him before the delivery of it to the intended lessee, and "before the lessee executed the counter part. I am of opinion "that there exists a locus penitentiæ in the lessor, and that "he may, at any time before the solicitor or his agent has "delivered over the lease to the lessee, countermand the "delivery of it and refuse to be bound by it. I am of opinion "that such execution does not constitute a contract.

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(1) (1864) 33 Beav. 440.

(2) Ibid. 445.

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"It is argued, with perfect truth, that a contract need not "be signed by both parties, and that if A. sign a contract "offering to sell certain lands to B., and send it to him, B. may "accept it and thereupon enforce the performance of it. But, "for the purpose of making it binding on the signer, the contract must be sent to B., either by A. or his agent duly "constituted for that purpose. But what is more germane to "the present question is this: In the case of a contract, "A. may countermand it and refuse to perform it at any time "before B. has accepted it and before B. has also thereby "bound himself to perform it. But nothing of that sort "occurred here; and if the most formal contract had been "prepared and signed by the defendants, and given to their "agent to be delivered to the plaintiffs, they or either of them "might have stopped the whole thing before the document left "their agents' hands."

Now there, of course, was a case of a deed, delivery of which was essential, and there was the further point that the power to lease was only to arise on a written request which had not been given. I cannot find anything to help me in that case.

Keppel v. *Wheeler* (1) contains many references to exchange. I will mention them, premising, however, that the word in its contexts means "become binding" and is not to be read as indicating the necessity for an exchange in every case, irrespective of any arrangements the parties may make to suit their own convenience.

First, there is the headnote, which is as follows: "Agents "employed to sell land are generally employed to obtain the "best purchase price reasonably obtainable. Their duty to "their principal does not cease when they have procured an "offer to purchase which he accepts subject to contract. It is "still their duty to inform him of any offer which they receive "at a higher price than that so accepted, and they remain "subject to this duty until final contracts of sale and purchase "have been signed and exchanged. The owner of house "property employed a firm of house agents to sell the property. "They gave particulars to a tenant of the property, among "other persons, and procured an offer from a prospective "purchaser. They communicated this offer to the owner, and "he accepted it subject to contract. The tenant then made an "offer to the agents to purchase the property from the "prospective purchaser at an increased price. In the bona fide

(1) [1927] 1 K. B. 577.

"belief that they had performed their duty as agents to the "owner when he had accepted the offer of the prospective "purchase subject to contract, they omitted to inform the "owner of the offer of the tenant. Afterwards final contracts "for the sale and purchase of the property were signed and "exchanged by and between the owner and the prospective "purchaser. The owner then brought an action against "the agents for damages for breach of duty in not disclosing to "him the offer of the tenant before the contracts were signed "and exchanged. The agents counterclaimed for commission "on the sale of the property: *Held*, that the obligation of the "agents to the owner was not fully performed when he had "accepted the offer subject to contract but continued until final "contracts were exchanged; that this obligation involved a "duty to communicate to him the offer of the tenant; that, "having committed a breach of this duty they were liable in an "action for damages, and that the measure of damages was the "difference between the price named in the contracts and the "price offered by the tenant. *Held* also, that in the circum-"stances the agents were entitled to their commission."

I will next read the following passage from the judgment of Bankes L.J. (1). His Lordship says: "I pause here to state "plainly what is now well established, that where a person "accepts an offer subject to contract, it means that the matter "remains in negotiation until a formal contract is settled and "the formal contracts are exchanged; so that although those "instructions were given by the appellant to the respondent "Atkins, the matter remained in negotiation in the eye of the "law until June 11, that being the date on which the contracts "were exchanged, though they were apparently signed on "June 8. So between May 29, when the authority was given "to close with Mr. Essam's offer subject to contract, and "June 11 or possibly June 12, the matter, as between the plain-"tiff and Mr. Essam, remained in negotiation."

Sargant L.J. said this (2): "To my mind it is quite clear as "regards time, that when agents are employed to find a pur-"chaser for a property, their position as agents cannot "definitely end at any time short (at the earliest) of the time "when a definite binding contract is entered into and exchanged: "and that, if in the interval they receive information—"whether, as in this case, from some one with whom they had "originally communicated on behalf of their principal, or from

(1) [1927] 1 K. B. 577, 584.

(2) Ibid. 593.

" some outside source—which tends to show that the value of " the property was greater than had been supposed, or is otherwise of a nature to influence materially the judgment of their " principal in going on with, or ceasing to go on with, the " contract which was being originally negotiated, they are " bound to communicate that information to their principal; " and if they do not do so, they are guilty of a breach of their " duty as agents."

In *Chillingworth* v. *Esche* (1), my attention was drawn to a reference by Sargant L.J. to a contract being " signed and " exchanged "; as against which I find corresponding references by Pollock M.R., to a contract being " executed " and " prepared concluded and executed," and by Warrington L.J. to a formal document being " signed "—all alluding to the same eventuality. No emphasis is to be laid on the word " exchange " as used by Sargant L.J.

I find nothing to help me in *Lockett* v. *Norman-Wright* (2), or in *Wilson* v. *Balfour* (3), and the only other case cited to me was *Spottiswoode, Ballantyne & Co., Ld.* v. *Doreen Appliances, Ld.* (4)

I will read the headnote: " The plaintiffs, who were owners " of a lease of premises, by a letter written by their agents, " agreed to let the premises to the defendants ' subject in the " ' usual way to your references being satisfactory, and to the " ' terms of a formal agreement to be prepared by their (the " ' plaintiffs') solicitors.' They also said that, if the references " were approved, and the defendants paid a quarter's rent in " advance, they would do certain work to the premises and would " allow the defendants to enter into possession, provided that " the defendants gave an undertaking to vacate the premises " if no agreement was entered into. The defendants paid the " quarter's rent in advance and entered into possession of " the premises. The plaintiffs' solicitors drew up a draft lease, " which was sent to the defendants, who agreed the terms with " the plaintiffs' agents. A few days later the plaintiffs refused " to proceed with the agreement to let the premises to the " defendants and called on them to remove their machinery " and to vacate the premises. As the defendants refused to do " so, the plaintiffs brought an action to recover possession, and " the defendants counterclaimed for specific performance of

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(1) [1924] 1 Ch. 97, 105, 106, 111, 114.

(2) [1925] Ch. 56.

(3) 45 T. L. R. 625.

(4) [1942] 2 K. B. 32.

"the agreement by the plaintiffs to give a lease of the premises "to them: *Held*, that the letter of the plaintiffs' agents did "not serve to complete a binding contract, and that the true "meaning of the words 'subject to the terms of a formal "'agreement to be prepared' was that no contract was to "exist between the parties unless and until a formal agreement "had been entered into. Decision of Atkinson J. (1) reversed."

I will now read the opening passage in the judgment of Lord Greene M.R. (2): "The question for our determination "is very short, and one, which, to my mind, with all respect to "the learned judge, has a clear answer. It turns on the "meaning of the letter of August 1, 1941, the crucial words "being those which refer to a formal agreement being entered "into. It is said by the defendants that the words in the letter "mean nothing more than that, as soon as the solicitors for the "plaintiffs had put into formal shape the matters on which the "parties were in agreement, a binding, unconditional contract "would come into existence, notwithstanding that the formal "document in which those terms were to be set out was never "signed and exchanged by the parties. On the other hand, the "plaintiffs contend that the language means that no contract "was to exist between the parties unless and until a formal "agreement had been entered into. In my opinion, the second "construction is unquestionably right. I am quite unable to "construe the words 'subject to the terms of a formal agree-"'ment to be prepared by their solicitors' as meaning that the "'formal agreement' referred to is *not* one which is to be "executed by the parties in the usual way. An unexecuted "document would not be a formal agreement. If any doubt "could remain as to the true construction of the phrase, the "matter is entirely settled, in my judgment, by the words "referring to the undertaking to vacate when called on if no "agreement is entered into. It is manifest that the agreement "there referred to is the same as the formal agreement "mentioned in the earlier passage, and how a formal agreement "is to be entered into unless it is executed and exchanged in the "usual way I am unable to discover. The real fact of the matter "is that the language used here is equivalent to the common "and more concise phrase 'subject to contract' and it is well "settled that that phrase makes it clear that the intention of "the parties is that neither of them is to be contractually "bound until a contract is signed in the usual way."

(1) [1942] 1 K. B. 251. (2) [1942] 2 K. B. 32, 34.

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In the judgment of Goddard L.J. (1), the passage I have already quoted from the judgment of Bankes L.J. in *Keppel* v. *Wheeler* (2), is cited with approval.

The question here, as in all the cases cited, is not whether the contract was signed and exchanged in the usual or any other way, but whether, having been signed, it became by exchange or otherwise binding as a contract between the parties. The circumstances of the case are unusual, but on the whole I think that it did become binding when the plaintiff, in response to the defendants' invitation, put his signed part of the contract into the post on the afternoon of June 18, 1946. I may refer to the passage in Lord Blackburn's speech in *Brogden* v. *Metropolitan Ry. Co.* (3), where he says this: " But I have always believed " the law to be this, that when an offer is made to another party, " and in that offer there is a request express or implied that he " must signify his acceptance by doing some particular thing, " then as soon as he does that thing, he is bound. If a man sent " an offer abroad saying: I wish to know whether you will " supply me with goods at such and such a price, and, if you " agree to that, you must ship the first cargo as soon as you get " this letter, there can be no doubt that as soon as the cargo was " shipped the contract would be complete, and if the cargo went " to the bottom of the sea, it would go to the bottom of the sea " at the risk of the orderer. So again, where, as in the case of " *Ex parte Harris* (4) a person writes a letter and says, I offer " to take an allotment of shares, and he expressly or impliedly " says, If you agree with me send an answer by the post, there, " as soon as he has sent that answer by the post, and put it out " of his control, and done an extraneous act which clenches the " matter, and shows beyond all doubt that each side is bound, " I agree the contract is perfectly plain and clear."

Accordingly, there must be the usual decree for specific performance.

Judgment for plaintiff.

Solicitors: *Godfrey Warr & Co.; Nisbet Drew & Loughborough, for Pearless, de Rougemont & Co., East Grinstead.*

(1) [1942] 2 K. B. 32, 37.
(2) [1927] 1 K. B. 577, 584.
(3) (1877) 2 App. Cas. 666, 691.
(4) L. R. 7 Ch. 587.

B. A. B.

In re ARMSTRONG WHITWORTH SECURITIES COMPANY, LIMITED.

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July 2, 3, 4, 7, 30, 31.

Company—Voluntary liquidation—Advertisement for creditors—Contingent claims for workmen's compensation—Partial distribution among contributories ignoring contingent claims—Duty of liquidator to inform workmen of liquidation—Right to claim of workmen becoming incapacitated—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84)*—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.*23) *ss.* 247, 261*—Companies* (*Winding-up*) *Rules,* 1929, *r.* 104.

A company had, from 1896, carried on an engineering business employing a large number of workers. It had been its own insurer until June 1, 1933, in respect of its liability under the Workmen's Compensation Acts. Complete records had been kept from 1918 onward of accidents to employees and there were some sixteen thousand cases recorded of accidents which occurred before June 1, 1933. With each case was the name and address of the workman concerned. On September 16, 1943, a special resolution was passed for the voluntary winding up of the company and H. was appointed liquidator. In September, 1943, he advertised as liquidator for creditors under r. 104 of the Companies (Winding up) Rules, 1929. No steps, other than this general advertisement for claims, were taken to ascertain the company's position in regard to the contingent claims of former employees under the Workmen's Compensation Acts. A final meeting of the company was held on October 31, 1945, and the accounts of the company were duly passed. The liquidator proceeded to distribute the surplus assumed to be available for distribution. He paid the "B" shareholders in full, but the "A" shareholders were very numerous and it had not been possible to complete the distribution before the death of H. on March 11, 1946. At that date about 15,000*l.* remained in his hands representing the sum allocated to return of capital to the "A" shareholders then still unpaid and the sum which had been voted for H.'s remuneration. Since October 31, 1945, when the final meeting of the company was held, four former employees of the company had put in claims for compensation under the Workmen's Compensation Act, 1925, in respect of accidents which had occurred before June 1, 1933. In each case the incapacity had arisen since the company went into liquidation. The applicant, who had been appointed liquidator in place of H., by this summons asked how he should deal with the sum available for distribution in his hands.

Held, first, that each of the four claimants, although unable to establish any actual accrued liability against the company at the commencement of the winding up, nevertheless had, at that date, a contingent claim for which he was entitled to have provision made under ss. 247 and 261 of the Companies Act, 1939.

Held, secondly, that r. 104 did not defeat the claim of a creditor put in after a partial distribution among the shareholders had been

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made, although the admission of the claim might result in some of the shareholders having been overpaid at the expense of others. Accordingly, on the assumption that the deceased liquidator was entitled to distribute without taking any steps to ascertain the position regarding workmen's compensation claims beyond the advertisement under r. 104, the four claims received, to the extent to which they could be substantiated, must be provided for out of the balance remaining in the hands of the liquidator. On that assumption, recourse could not be had to the sum allocated to the deceased liquidator's remuneration or against his estate either to satisfy claims notified after March 11, 1946, or to compensate unpaid " A " shareholders in respect of the loss suffered by them.

Held, thirdly, that the deceased liquidator did not fully perform his duty as regards the ascertainment of the company's liabilities accrued or contingent for compensation to former employees shown by the company's records in his possession to have been injured prior to the insurance effected in 1933. He had in his possession the files in respect of all accidents since 1918. He must be taken to have known that in every case in which a declaration of liability had been filed, and in every case in which there had been no such declaration but in which compensation had been claimed and paid, the company was under a contingent liability to pay compensation for total or partial incapacity resulting from the injury whenever such incapacity might occur or recur. It was his duty as liquidator to take all steps reasonably open to him on the information in his possession to ascertain whether any of the former employees concerned did make any such claim. He should have written to each such employee. The number of cases did not render this course impracticable. It was his duty under s. 247 of the Companies Act, 1929, to apply the company's assets in satisfaction of the company's liabilities before making any distribution amongst the shareholders. Accordingly, it was the duty of this present liquidator, if he were unable to effect an insurance against the company's liability to former employees in respect of claims under the Workmen's Compensation Acts, to give written notice to all such employees informing each one of the liquidation and requiring him, if he had any further claim under the Acts, to give notice thereof to the liquidator within the time specified in the notice. The balance in his hands should then be applied, after paying his own costs and remuneration, towards payment of the amounts due to such employees. The question whether the sum allocated to the deceased liquidator's remuneration was so applicable was reserved.

SUMMONS.

This was an application by Alfred Turner Hetherington, the present liquidator in the voluntary winding up of Armstrong Whitworth Securities Co., Ld., for directions as to the disposal of a balance of between 15,000*l.* and 16,000*l.* remaining in his hands as such liquidator, having regard to claims for workmen's compensation which had been made by four former employees

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of the company, and to the possible existence of other similar claims.

The following statement of facts is taken substantially from his Lordship's judgment.

The company was incorporated on January 31, 1896, under the name of "Sir W. G. Armstrong & Company Ld." (changed on March 3, 1897, to "Sir W. G. Armstrong "Whitworth & Company, Ld."), and for many years carried on an extensive business as armament manufacturers, engineers and shipbuilders. In consequence of a scheme of amalgamation with Vickers, Ld., arranged in the year 1927 the company, as from December 31 in that year, transferred a substantial part of its undertaking to a new company called "Vickers "Armstrongs, Ld." In 1928, the company carried out a scheme of reorganization under which (inter alia) substantially the whole of what remained of its undertaking after the transfer to Vickers Armstrongs, Ld., was transferred to two new operating companies named respectively, "Sir W. G. Armstrong "Whitworth & Company (Engineers), Ld.," and "Sir W. G. "Armstrong Whitworth & Company (Shipbuilders), Ld.," part of the undertaking so transferred being subsequently made over to a third new operating company named "Sir W. G. "Armstrong Whitworth & Company (Ironfounders), Ld." The effect of these transactions was that the company became, as from January 1, 1929, a holding company owning all the shares in the three operating companies and carrying on no other business apart from a small laboratory and experimental establishment at Slough in Buckinghamshire. To mark this alteration in the company's position its name was, on July 6, 1929, changed to its present name of Armstrong Whitworth Securities Company, Ld.

In the years 1934 and 1937 the company disposed of its holdings in the three operating companies, and, accordingly, by the end of the latter year, it no longer had any interest as shareholder or otherwise in any of the undertakings it had formerly carried on.

During the period from its incorporation down to the transfer to Vickers Armstrongs, Ld., at the end of 1927 the company employed an average of some 30,000 employees. This number was reduced to some 5,000 as a result of that transfer, and still further reduced in consequence of the transfers at the end of 1928 to the new operating companies, after which time the company only employed office staff, apart from the few

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employees required for the laboratory and experimental works during such time as the company continued to carry them on. The total of reported accidents to employees of the company during the whole of its career of active operations was estimated at over 50,000 and down to June 1, 1933 (when it had already ceased active operations apart from the small laboratory and experimental establishment above referred to) it acted as its own insurer in respect of its liability for workmen's compensation.

The company's method of dealing with compensation cases was described in the affidavit evidence of the liquidator, Mr. Hetherington, and the company's former compensation officer, a Mr. T. A. Wright. Mr. Hetherington was employed for many years on the administrative staff of the company (holding from 1922 to 1929 the post of personal assistant to the secretary, and from 1929 to the commencement of the winding-up the post of secretary), and from the commencement of the winding-up down to March 11, 1946, acted as whole-time assistant to the first liquidator, a Mr. James Hawson, who had previously been a director and chief controller of the company. Mr. Wright was employed by the company from the year 1900 down to August 2, 1937, and from May, 1918 onwards he held the appointment of compensation officer to the company. From the evidence of these two witnesses it appeared that the records of accidents prior to 1918 were no longer in existence, the only information extant as regards these accidents, when Mr. Wright took over from the previous compensation officer in May of that year, being contained in a book in which statistical summaries of accidents from 1893 to 1918 were entered without any details of individual cases. In May, 1918, Mr. Wright instituted, and thereafter carried on, a system under which every accident involving injuries to a workman employed by the company was reported to him and recorded by means of a filing system with a separate folder for each case. Some of the company's works and yards had separate labour officers who kept their own records, but these records were taken over by Mr. Wright, as to some in or about January, 1929, and as to the remainder in or about November, 1934, so far as they concerned accidents which had occurred down to December 31, 1927, and were considered "live" (that is, possible subjects of further claims) at the time of taking over. The cases so taken over by Mr. Wright were incorporated by him in the filing system mentioned above, with a separate folder for each case. Each folder in Mr. Wright's system would contain a report of the accident (including the name and address of the workman), and, if no claim was made by the workman, nothing more. In the event of a claim by the workman (that is, in the majority of cases), the folder would also contain a claim form signed by the workman, and a medical report. In the event of a declaration of liability under the Workmen's Compensation Acts being signed, the folder would also contain that document or a copy of the original filed at the county court. In the event of a lump sum being paid in settlement, this would also be recorded in the folder. Any weekly compensation payments were not, however, so recorded, the records of these being kept in separate books, most of which have since been destroyed. The number of reported accidents in respect of which claims were made was substantially over 50 per cent of the total number reported, and the proportion of claims followed by declarations of liability was probably rather less than 25 per cent. of the total number of claims.

During the period 1918–1936, it was Mr. Wright's practice to make an annual review of all his accident cases " to determine," as he put it, " whether they should be treated as ' live cases ' " or whether I should write them off as no longer likely to crop " up again," and report on the position to the directors. In 1933 the company effected an insurance against liability in respect of injuries to its employees occurring after June 1 in that year. In 1938, Mr. Wright (who had left the company's employment the previous year) assisted Mr. Hawson in the preparation of a list of " outstanding " cases with a view to obtaining insurance cover for them. As a result a list of one hundred and forty-one cases was settled and insurance cover was obtained for these for a premium of 64,000*l*. This list included all cases in which compensation was actually being paid or the last payment was of fairly recent date, and also all cases in which from the nature of the injury " it appeared " (in Mr. Wright's words) " that " there was a reasonable prospect of recurrence of the injury " which would give the workman a right to future com- " pensation." Numerically, the one hundred and forty-one cases thus covered by insurance represented a minute fraction of the total, since the records of accidents from May 1918, onwards—compiled by Mr. Wright—comprise between 16,000 and 17,000 individual cases, each with its separate folder as already described.

The company was put into voluntary liquidation by a special

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resolution passed on September 16, 1943, and by the same resolution Mr. Hawson was appointed liquidator. The winding up was a members' voluntary winding-up. At the date of this special resolution the capital of the company was 8,912,500*l.* divided into 31,929,740 " A " ordinary shares of 1*s.* 0*d.* each, of which 10,256,250 had been issued and were fully paid up, and 14,632,026 " B " ordinary shares of 10*s.* 0*d.* each, of which 4,700,000 had been issued and were fully paid up. This capitalization was the result of a reorganization under which 10*s.* 0*d.* " B " shares had been issued to the company's bankers (who still held the whole of the issued shares of this class at the commencement of the winding-up) and the issued capital as existing prior to the reorganization had been converted into 1*s.* 0*d.* " A " shares of which there appeared to have been 25,951 holders at the commencement of the winding-up. The surplus assets distributable amongst the members in a winding-up were divisible between the holders of the issued shares of the two classes in the proportions of 90 per cent. to the " B " shareholders and 10 per cent. to the " A " shareholders. In the month of September, 1943, Mr. Hawson as liquidator caused an advertisement for creditors under r. 104 of the Companies (Winding Up) Rules, 1929, in the usual general form to be inserted in the following newspapers: *The Times, The Daily Telegraph, The Manchester Guardian, The Newcastle Journal,* calling upon the creditors of the company on or before November 1, 1943, to send in to him particulars of their debts or claims, and, if so required by him, to come in and prove their said debts and claims and stating that, in default thereof, they would be excluded from the benefit of any distribution made before such debts were proved.

No steps, apart from this general advertisement for claims, were taken by Mr. Hawson to ascertain the company's position as regarded liability in respect of upwards of 16,000 recorded cases not covered by insurance of accidents sustained in the company's service by former employees of the company.

On November 3, 1944, Mr. Hawson gave notice to the " B " shareholders of a first return of 2*s.* 9*d.* per share on the " B " shares payable on November 9, 1944, and this return (absorbing 646,250*l.* of the assumed surplus available for distribution amongst the members) was on or about the latter date paid by him to the " B " shareholders accordingly. On October 1, 1945, Mr. Hawson gave notice to the " B " shareholders of a second and final return of 3·695,805*d.* per share on the " B " shares payable on October 15, 1945, and to the "A" shareholders of a first and final dividend of 1·872*d.* per share on the "A" shares payable on or after October 15, 1945. The second and final return to the "B" shareholders (absorbing a further 72,376*l.* 3*s.* 8*d.* of the assumed surplus) was paid accordingly on or about October 15, 1945. The payment of the first and final return to the "A" shareholders (representing the balance, namely, 79,998*l.* 14*s.* 10*d.* of the assumed surplus) obviously presented more difficulty owing to the large number of shareholders concerned. On October 15, 1945, it was found that the company only had 1,200 cheques, so that only that number of "A" shareholders could, in the first instance, be paid. It took, under war conditions, four to six weeks to obtain the necessary supply of cheques. Then there was delay on the part of many of the "A" shareholders in the production of their share certificates, without which payment could not be made, and there were also "A" shareholders who could not be traced. In these circumstances, the process of making the first and final return to the "A" shareholders was protracted over several months. Owing to the cheque difficulty it seemed that only a small proportion of the total of 79,998*l.* 14*s.* 10*d.* representing this return could have been actually distributed by October 31, 1945 (the date of the final meeting referred to below). By February 4, 1946, some 60,071*l.* 16*s.* 6*d.* had been distributed amongst "A" shareholders. A further 8,223*l.* 4*s.* 11*d.* was distributed between February 4, 1946, and March 11, 1946, leaving a balance on the latter date of 11,703*l.* 13*s.* 5*d.* representing the return of 1,500,472 "A" shares, the holders of which numbering 7,798 had not, at that date, surrendered their certificates or had not then been traced. No further distribution had since been made.

The final meeting of the members of the company under s. 236 of the Companies Act, 1929, was held on October 31, 1945. The account laid before and approved by that meeting provided for the payment to Mr. Hawson of the sum of 3,500*l.* for his remuneration as liquidator, and showed as the balance available for distribution amongst the members the above amounts, namely, 79,998*l.* 14*s.* 10*d.* for the "A" shareholders, and 718,626*l.* 3*s.* 8*d.* for the "B" shareholders, making a total of 798,624*l.* 18*s.* 6*d.* The slight discrepancy between these proportions and the strict proportions of 90 per cent. to the "B" shareholders and 10 per cent. to the "A" shareholders was accounted for by the fact that a Board of Trade fee of

1,326*l.* 10*s.* 0*d.* was, by agreement, thrown wholly upon the "B" shareholders' interest in the assumed surplus.

A copy of the final account and return of the holding of the meeting appeared to have been duly sent to the Registrar of Companies and registered by him on November 7, 1945. In the ordinary course, therefore, the company would, by virtue of s. 236, sub-s. 4, of the Act, have been deemed to be dissolved on February 7, 1946. But the date of dissolution had been deferred from time to time by successive orders of the court, in the first instance, on account of the fact that certain foreign patents, the beneficial interest in which had been disposed of by the company, were still registered in the company's name and could not at present be effectively assigned owing to war conditions, and latterly on account of the workmen's compensation claims to which the present summons related. The latest of these orders was made on April 22, 1947, and deferred the dissolution of the company until November 7, 1947.

Mr. Hawson died on March 11, 1946, and his personal representatives were respondents to the present application. By an order made on June 28, 1946, Mr. Hetherington was appointed liquidator in his place. Since the death of Mr. Hawson no further distribution had been made, so that there now remained in the hands of Mr. Hetherington as liquidator, the sum of 3,500*l.* allocated in the account to Mr. Hawson's remuneration and the sum of 11,703*l.* 13*s.* 5*d.*, representing the undistributed balance of the 79,998*l.* 14*s.* 10*d.* allocated in the account to the return of capital to the "A" shareholders, and these sums were included in the total balance of between 15,000*l.* and 16,000*l.* to the disposal of which the present application related. A number of the unpaid "A" shareholders had in the meantime presented their certificates, and one of those who had done so was joined as a respondent to represent the interests of the unpaid "A" shareholders. Between the commencement of the winding-up and October 31, 1945, one claim for compensation under the Workmen's Compensation Acts was made by a former employee of the company named Barkess, and this claim was settled by Mr. Hawson for a lump sum payment of 300*l.* Since October 31, 1945, six such claims have been made, of which two have been withdrawn. The claimants in the four other cases were the respondents, Mack, Thompson, Orr and Rutherford. None of these four cases was covered by the further insurance effected in 1938, Mr. Wright's explanation being that they had been written off by him as regards the cases of Mack, Orr and Rutherford in 1927, and as regards the case of Thompson in 1930, and were not, in his opinion, likely to recur. Each of the four cases was recorded in one of the separate folders referred to above, and it was not disputed that each of the four men concerned had lived at the same address (that was, the address appearing in the folder relating to his case) since the time of his accident. It was further not disputed that none of them saw the advertisement for creditors issued by the liquidator in September, 1943.

The following is a summary of the other relevant facts regarding the four claims : (i.) the respondent Mack's claim was notified in general terms by his solicitors to the company's solicitors by letter, dated February 4, 1946. He was formerly employed by the company as a fitter in the locomotive department, and in the course of his employment he suffered an injury to his head in an accident which took place on January 10, 1922, at which date he was forty-six years of age. Owing to the accident he was unable to and did not resume his employment with the company until the end of March or the beginning of April, 1922. A declaration of liability under the Workmen's Compensation Acts, 1906–1919, in respect of the accident, dated July 29, 1922, was filed in the local county court in August of that year. A few months after resuming work, he was discharged owing to labour conditions, but after about a year's unemployment was re-employed by the company in November, 1923, and thereafter continued in the employment of the company down to January 1, 1928, and from that date until September, 1945, in the employment of Vickers Armstrongs, Ld. During the period from November, 1923, down to February 4, 1946, no claim against the company for compensation was made by him or on his behalf. Mack stated that in the accident he sustained injury to his left groin as well as to his head. He said he had been unable to secure suitable work since September, 1945, and attributed this to partial incapacity on account of the accident, the disability consisting of pains in the head and loss of memory. He said that the trouble has grown more severe since September, 1945, and that he has a swelling in the left groin which was very sore. He was examined by a doctor on May 24, 1946. The doctor's report expressed the opinion that, as a result of his old head injury, Mack had a mild disability in the form of lapses of memory, also stating that he had a right inguinal hernia, and concluded as follows : "It would be difficult to claim incapacity for work "as he has carried on in spite of his accident but I think it "would be agreed that some compensation is warranted. "He has an inguinal hernia which renders him unfit for hard "manual work."

(ii.) The respondent, Thompson, was formerly employed by the company as a turner in its locomotive department, and in the course of his employment suffered an injury to his right eye in an accident which took place on October 20, 1921, being then twenty-seven years of age. Owing to the accident he was unable to resume, and did not resume, his employment with the company until March, 1922. Shortly after such resumption, he was discharged owing to labour conditions. A declaration of liability under the Workmen's Compensation Acts, 1906–1919 was signed in January, and filed in the local county court in January or February, 1922. In 1926, Thompson asked the company for work and was, at the request of the company's compensation department, examined by an eye specialist. The specialist who examined Thompson on July 2, 1926, reported extremely defective vision, but not blindness, in the injured eye, and stated that the left eye was not affected, and would not become affected, and that Thompson had nearly full vision with it. The specialist further stated that he thought Thompson could do his old work then, but it was probable that he would be slower when he first started again. Thompson's application for work was refused on August 10, 1926, the reason assigned for such refusal being the then prevailing industrial difficulties. Since his discharge by the company Thompson has been variously employed, first as a travelling draper, then as a labourer, and finally for nineteen years by the Northern General Transport Company, Ld. Latterly his right eye gave him renewed trouble, and in March, 1946, he went to hospital and underwent an operation for its removal. He was an in-patient from March 11 to March 30, 1946, and did not return to work till June, 1946, and claimed that, since returning to work, he had lost further time through the same trouble. He stated that he was working as a rough fitter and earned 5*l.* a week. He was examined on February 17, 1947, by an eye specialist who reported that as a result of the accident Thompson had lost his right eye, but that the remaining eye was healthy and he had excellent sight with it; that the left eye had not suffered in any way as the result of the accident, and that there was now no danger of its being attacked by sympathetic ophthalmia. The specialist considered Thompson fit for the work he was then doing, which he might find easier if he wore glasses of a type mentioned, but did not think he could return to his old work as a turner, adding that the loss of his eye would make it difficult for him to get work if he lost his present job. Thompson had an interview with Mr. Wright in October, 1942, and he then told Mr. Wright his right eye was getting worse, and he needed glasses, and asked Mr. Wright for advice what to do. Mr. Wright advised him to see Mr. Hetherington which he did in November, 1942. At his interview with Mr. Hetherington he told Mr. Hetherington he needed glasses; and Mr. Hetherington referred him to his approved society. The learned judge was satisfied that Thompson did not, on this occasion, assert any claim against the company for compensation other than the tentative claim for the cost of the glasses, which he did not pursue, and there was, moreover, no evidence that Mr. Hetherington made any report of the interviews to Mr. Hawson. Thompson had a further interview with Mr. Hetherington in April, 1946. At this interview Thompson made it plain to Mr. Hetherington that he wished to claim compensation and asked how he stood in the matter. But the date of the interview being in April, 1946, the position then was that Mr. Hawson was dead and his successor as liquidator had not yet been appointed, so that nothing could, for the time being, be done about Thompson's claim. This was explained to Thompson in Mr. Hetherington's letter to him of April 24, 1946. As already stated, there had been no distribution of assets in the winding-up since March 11, 1946, and, accordingly, this interview, taking place as it did in April, 1946, clearly could be of no material assistance to Thompson's case. A formal notification (in general terms) of Thompson's claim was made by his solicitors to the company's solicitors by letter, dated May 20, 1946.

(iii.) The respondent Orr was formerly employed by the company as a chargeman on buffing machines and grindstones, and in the course of his employment he suffered an injury to his right arm and the fingers of his left hand in an accident which took place on July 20, 1918, he being then forty-three years of age. By reason of such accident he was unable to and did not resume his employment with the company until April, 1920. A declaration of liability under the Workmen's Compensation Act, 1906, in respect of the accident was signed in April, and filed in the local county court in May, 1920. From his return to work in April, 1920, he continued in the employment of the company down to December 31, 1927, and thereafter down to 1944 in the employment of Vickers Armstrongs, Ld., in his pre-accident capacity of a chargeman grinder, which he could do in spite of his disability as it was only supervisory work. In August, 1944, Orr saw Mr. Wright (then employed by Vickers Armstrongs, Ld.), who, being no longer in the company's employment, told Orr he could do nothing for him, and also informed Orr that the company was in liquidation, and he did not know what Orr's prospects of obtaining compensation would be. Orr's solicitors notified Mr. Hetherington (in general terms) of Orr's claim by letter, dated May 2, 1946. Orr was medically examined on February 12, 1947, and the doctor's report concluded with the opinion " This man is now virtually " a one-handed man with, in addition, some impairment of " the function of the one hand (left): In my opinion his " incapacity is in the region of 60 per cent.—70 per cent., and " in view of his advancing years and physical condition the " prospect of employment is ' extremely remote '."

(iv.) The respondent Rutherford was formerly employed by the company as a press hand in the cartridge and fuse body department, and, in the course of his employment, the second finger of his right hand was injured in an accident which took place on November 19, 1927, and necessitated the removal of the first joint of the finger. He was then twenty years of age. By reason of the accident he was unable to and did not resume his employment until January 3, 1928, when he entered the employment of Vickers Armstrongs, Ld., who had taken over the works in question from January 1, 1928, and remained in that employment (apart from absence for a period on account of a further injury in 1937) until September, 1943, when he left on account of tuberculosis. He was medically examined on February 8, 1947, and the doctor reported him to be " suffering from effects of amputation of right middle finger in so " far as it affects the grip." There was no declaration of liability in this case, but it was not in dispute that weekly compensation was paid to him by the company during the period of his absence from work on account of the accident, and that this amounted to an admission of liability. On July 9, 1946, the Iron Trade Employers Insurance Association, Ld., wrote to Mr. Hetherington for information about the accident to Rutherford in 1927, as a result apparently of a claim made by Rutherford on the footing that that accident as well as his subsequent accident in 1937 had occurred while he was in the employment of Vickers Armstrongs, Ld. In consequence of this letter, the matter was taken up between Rutherford's and the company's respective solicitors.

By this summons the liquidator asked whether the funds in his hands ought to be applied by him in paying his own costs expenses and remuneration, and in paying a dividend to the unpaid "A" shareholders and the deceased's liquidator's remuneration, or whether such fund, or any part thereof, should be retained and applied towards payment of the liability of the company to the four respondents who were claiming compensation under the Workmen's Compensation Act, 1925. The personal representatives of the deceased liquidator, an "A" shareholder who had not been paid and the four former employees who claimed compensation were respondents to this application.

Strangman and *G. F. R. Morris* for the liquidator.

Ungoed-Thomas for the personal representatives of the deceased liquidator. If the requirements of r. 104 of the Companies (Winding up) Rules, 1929 (1) were complied with, the payments which were made before the former employees claimed under the Workmen's Compensation Act, 1925, cannot be disturbed, nor, in view of the provisions of s. 254 of the Companies Act, 1929, can the deceased liquidator's remuneration be affected. Even if a proper notice was not given under r. 104, any liability of the deceased liquidator can only be decided in misfeasance proceedings. The advertisements under r. 104 were all that was required. The deceased liquidator cannot be deemed to have constructive knowledge of all possible contingent claims under the Workmen's Compensation Act, 1925. The equitable doctrine of constructive notice is not extended to commercial transactions: *Greer* v. *Downs Supply Co.* per Scrutton L.J. (1). A liquidator is only to be deemed to have notice of what he might have ascertained from the company's books: *Pulsford* v. *Devenish* (2). Actual knowledge of the workmen's claims cannot be inferred. The statutory duty of a liquidator is to pay the debts of the company of which he has knowledge. It would be unreasonable to expect a liquidator to search over 16,000 files dealing with injuries to workmen. A company is under no duty to keep a record of claims under the Workmen's Compensation Act, 1925. There is nothing here which would fix a liquidator with knowledge.

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(1) By the Companies (Winding-up) Rules, 1929, r. 104: "(1.) Subject to the provision "of the Act, and unless otherwise "ordered by the court, the liquidator in any winding-up may "from time to time fix a certain "day, which shall be not less "than fourteen days from the "date of the notice, on or before "which the creditors of the company are to prove their debts or "claims, and to establish any "title they may have to priority "under s. 264 of the Act, or to "be excluded from the benefit "of any distribution made before "such debts are proved, or as the "case may be from objecting to "such distribution.

"(2.) The liquidator shall give "notice in writing of the day so "fixed by advertisement in such "newspaper as he shall consider "convenient, and in a winding-up by the court to every person "mentioned in the Statement of "Affairs as a creditor, ... "and in any other winding-up "to the last known address or "place of abode of each person "who, to the knowledge of the "liquidator claims to be a creditor "or preferential creditor of the "company and whose claim has "not been admitted."

D. S. Chetwood for C. F. Hitchins, an unpaid "A" shareholder. The requirements of r. 104 were duly complied with. From October 31, 1945, when the final meeting of shareholders was held, the liquidation was completed and the balance of the money in the hands of the liquidator is held in trust for the unpaid "A" shareholders. The payment of the dividend does not depend on the chance whether it was in fact made before a creditor put in a claim.

P. R. Pain for the four employees claiming compensation under the Workmen's Compensation Acts. The liquidator had constructive notice of the contingent claims under the Workmen's Compensation Act, 1925. He failed to comply with r. 104 so far as regards these claims. Creditors have a right under s. 247 of the Companies Act, 1929, to be paid in full before the contributories are paid at all. Where there has been a declaration of liability under the 1925 Act, a company and its liquidator has standing notice of a contingent claim whatever length of time may have passed since the accident. It is the duty of a liquidator to inquire if the contingency has occurred and, if it has not, to make provision against its occurrence. When a creditor has a claim which is admissible as a contingent claim, it must be included in the claim to be met in a winding-up: see s. 261 of the Act of 1929. He referred to *James Smith & Sons (Norwood), Ld.* v. *Goodman* (3). It is the duty of a liquidator to notify all the creditors of the liquidation however numerous they may be. The creditors have an absolute priority over the contributories.

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(1) [1927] 2 K. B. 28, 35.

(2) [1903] 2 Ch. 625.

(3) [1936] Ch. 216.

Cur. adv. vult.

July 30. JENKINS J., after stating the facts set out above, continued : It is not apparent that any of the four claimants could show that at the commencement of the winding-up the company was under any actual accrued liability to him for compensation. In order to make this out it would not be enough to show merely that at the commencement of the winding-up the claimant was still suffering from the injury, or the after-effects of the injury, caused by the accident. It would be necessary to prove total or partial incapacity for work resulting from the injury, either during some period preceding the winding-up and not covered by compensation already paid by the company, or during a period current at the commencement of the winding-up. The evidence does not prove this as regards any of the claimants ; on the contrary, so far as the evidence at present before me goes, each of them appears, since the initial period of incapacity, to have been in full work (apart from causes unconnected with the relevant accident) at all events down to a date subsequent to the commencement of the winding-up. On the other hand, it is not in dispute that given an injury caused to a workman by an accident arising out of and in the course of his employment, duly reported and made the subject of a claim for compensation within the prescribed period (all of which prerequisites admittedly exist in the four cases before me), the employer is liable to pay compensation at any distance of time whenever total or partial incapacity for work resulting from the accident occurs or recurs.

This seems to me to involve the conclusion that each of the four claimants in the present case, although he might not be able to establish any actual accrued liability on the company at the commencement of the winding-up, at all events had grounds for asserting a contingent claim against the company for which he was entitled to have provision made out of the assets before any distribution amongst the shareholders. (See Companies Act, 1929, ss. 247 and 261.)

The question with which I am concerned in the present proceedings is not, however, the extent of the provision (if any) which ought to have been made for each of the four individual claims before me if it had been asserted before any distribution amongst the shareholders had taken place; but whether such claims (assuming them to be otherwise maintainable) have been defeated by the course of events in the winding-up.

It is contended on behalf of the personal representatives of the deceased liquidator and on behalf of the representative unpaid " A " shareholder that the claims in question have been so defeated, and in support of this contention reliance is placed on r. 104 of the Companies (Winding-up) Rules, 1929. Paragraph 1 of r. 104, empowers a liquidator " to fix a certain " day, which shall not be less than fourteen days from the date " of the notice, on or before which the creditors of the company " are to prove their debts or claims, and to establish any title " they may have to priority under s. 264 of the Act, or to be " excluded from the benefit of any distribution made before " such debts are proved, or as the case may be from objecting " to such distribution." Paragraph 2 provides that " the " liquidator shall give notice in writing of the day so fixed by " advertisement in such newspaper as he shall consider " convenient," and in a winding-up by the court as therein mentioned, " and in any other winding-up " (which is the present case) " to the last known address or place of abode of " each person, who to the knowledge of the liquidator, claims to " be a creditor or preferential creditor of the company and " whose claim has not been admitted."

It is said that the four claimants in the present case were not persons who, to the knowledge of the deceased liquidator, claimed to be creditors of the company, on the ground that, although it is clear on the evidence that he in fact knew, and in any case he must, I think, as liquidator be deemed to have known, of the existence and general nature of the information contained in the 16,000 or 17,000 individual folders comprised in the company's accident records, consultation of those records would not have informed him that the claimants or any of the other former employees named therein actually claimed to be creditors of the company, but merely that they would, or might, be entitled to claim to be creditors of the company if they were still alive and could show the actual occurrence of total or partial incapacity for work resulting from the injuries caused by their respective accidents, or such a prospect or possibility of future total or partial incapacity resulting as aforesaid as would suffice to support a contingent claim. Accordingly, it was said that the deceased liquidator was under no obligation, under para. (2.) of r. 104, to give notice of the day fixed under para. (1.) to the respective last known addresses or places of abode of the four claimants, and had fully satisfied the requirements of para. (2.) so far as they and all the other victims of recorded accidents were concerned, by means of the notice by advertisement given in September, 1943. It was therefore contended that by virtue of para. (1.) of r. 104 the deceased liquidator was entitled at any time after November 1, 1943 (the day fixed by the advertisement) to proceed to distribution amongst the shareholders without regard to any possible liability to the claimants, and that the effect of the distribution as actually carried out by him was to defeat their claims, not merely to the extent of the assets actually distributed before notice of such claims was received by him, but also as against assets remaining in hand at the time of receipt of such notice but earmarked or appropriated in account for the purpose of completing the distribution previously begun. It was submitted that so soon as a liquidator, having become entitled to distribute amongst the shareholders, has declared a distribution of so much per share and has partly effected it by making the appropriate payments to some of the shareholders, the assets remaining in his hands, to the extent necessary to complete the distribution thus commenced, become fixed with a trust in favour of the shareholders who have not yet received their proportion of the distribution, so as to oust the claim of a creditor coming in between the commencement of the distribution and its completion. Otherwise, it was said, the distribution would be disturbed, as the shareholders, who had received their proportion before the belated creditor came in, would be overpaid at the expense of those who had not.

I cannot accept this contention. It seems to me to ignore the cardinal principle that in a winding-up shareholders are not entitled to anything until all debts have been paid. If it was right, it would have equal application if the creditor's claim came in after the liquidator had paid away to shareholders only a minute fraction of the amount of the declared distribution. Indeed, one form in which the argument was put to me actually was that the amount of a declared distribution ought to be treated as having been actually paid away by the liquidator on the date of declaration, which would defeat a creditor afterwards coming in, even though the whole of the assets intended to be distributed then actually remained in the liquidator's hands.

No case has been cited to me in which it has been held that r. 104 has the effect as between creditors and shareholders of a company of defeating the claim of a creditor put in after a partial distribution amongst the shareholders, so far as regards the assets remaining undistributed at the date when the claim is received. No doubt admission of the creditor's claim produces the result that some of the shareholders will have been overpaid at the expense of others. But the remedy (if any) of the latter must, in my judgment, be in the nature of a claim for contribution against the former, and is not to be found in exclusion of the creditor, who claims against any undistributed assets by title paramount. Thus, even on the assumption that the deceased liquidator was fully entitled to distribute as he did without taking any steps to ascertain the position regarding workmen's compensation claims beyond the advertisement pursuant to r. 104, the four claims in question, to the extent to which they can be substantiated, must, in my judgment, be provided for out of the balance now remaining in hand. On the same assumption, recourse could not in my opinion be had to the sum allocated to the deceased liquidator's remuneration or against his estate either to satisfy the three claims notified after March 11, 1946, or to compensate the unpaid " A " shareholders in respect of the loss suffered by them in consequence of the whole of any provision for these claims having to be made out of their proportion of the assumed surplus. Different considerations might, however, apply as regards any provision required for Mack's claim, in view of the distribution of upwards of 8,000*l.* between the receipt of notice of his claim on or about February 4, 1946, and the cesser of distribution with the death of the deceased liquidator on March 11, 1946.

But I find myself unable to hold that the deceased liquidator did fully perform his duty as regards the ascertainment of the company's liabilities accrued or contingent for compensation to former employees of the company (including the four claimants now before the court) shown by the company's records in his possession to have been injured prior to the commencement of the insurance effected in 1933 in accidents arising out of and in the course of their employment by the company and not covered by the insurance effected in 1938. He had in his possession, in the folders to which I have referred, the names and addresses at the dates of their respective accidents of all such persons from May, 1918 onwards (with the exception of those cases which were considered not to be "live" when Mr. Wright took over from local compensation officers in 1929 and 1934 the records relating to employees at certain of the company's works and yards), and in every case in which compensation had been paid, the claim form signed by the workman and medical report, and also in every case in which a declaration of liability had been filed a copy of such declaration. He must, in my judgment, be taken to have known as liquidator, and there is no doubt on the evidence that he did actually know in his previous capacity, that the company's records included these facts and documents. He must further, in my judgment, be taken to have known that in every case in which a declaration of liability had been filed, and also that in every case in which there had been no such declaration but weekly compensation had been claimed and paid so as to fix the company with an admission of liability, the company was under a continuing liability to pay compensation for total or partial incapacity for work resulting from the injury caused by the accident whenever such incapacity might occur or recur. He, therefore, must, in my judgment, be taken to have known that he had the names and addresses (at the dates of the relevant accidents) of a large number of former employees of the company each of whom had, at all events, a contingent claim against the company for compensation unless he had in the meantime died, or had so completely recovered from the effects of his accident as to make any further total or partial incapacity for work resulting from the injury out of the question. In such circumstances, it seems to me that his duty as liquidator was to take all steps reasonably open to him on the information in his possession to ascertain whether any of the former employees concerned did make any such claim. The obvious step open to the deceased liquidator on the information in his possession was to send a notice to each such employee at the address shown in the folder relating to his case, informing him of the liquidation and asking him whether he made any claim. I decline to accept the suggestion that the number of cases involved rendered this course impracticable. A far larger number of shareholders were communicated with personally in the course of the winding-up. The deceased liquidator got in a total of upwards of 822,000*l.* assets of the company, which it was his statutory duty under s. 247 of the Companies Act, 1929, to apply in satisfaction of the company's liabilities before any distribution amongst the shareholders. The fact that the company's operations had been extensive and consequently that the ascertainment of the company's liabilities accrued or contingent to ex-employees injured in accidents sustained in the company's service would have involved a considerable amount of correspondence, work and expense could not absolve him from taking proper steps to ascertain those liabilities. Nor can I accept the suggestion that personal communication with the former employees concerned would have been fruitless because the addresses in the records were not necessarily their present addresses. In each of the four cases before the court communication with the former employee concerned at the address recorded in his folder would, in fact, have reached him, and I have no doubt that in many other cases notices sent to the recorded addresses would have been similarly received. In recorded cases in which notices sent to the recorded addresses produced no reply, and also in unrecorded cases (that is, those occurring before May, 1918, and those omitted as no longer "live" from the records taken over by Mr. Wright in 1929 and 1934) the statutory advertisement under r. 104 would no doubt be appropriate. But I decline to regard the provisions of r. 104 as to notice by advertisement as absolving a liquidator from individual communication with persons named, with their addresses, in the company's records, and appearing from those records to be persons who have or may have claims accrued or contingent against the company; and I also decline to regard the provision in that rule requiring the liquidator to give notice to the last known address or place of abode of each person who, to the knowledge of the liquidator, claims to be a creditor of the company, as limiting his duty of personal communication to cases in which he actually knows that the person communicated with does claim to be a creditor, as opposed to cases in which he knows that the person concerned may claim to be a creditor, and is in a position to find out whether such person does so claim or not by writing to him.

The observations on the duty of a liquidator as regards the ascertainment of claims against the company contained in *Pulsford* v. *Devenish* (1) and *James Smith & Sons (Norwood), Ld.* v. *Goodman* (2), appear to me to be much in point, and for the reasons above stated I think the deceased liquidator in the present case failed adequately to discharge that duty.

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(1) [1903] 2 Ch. 625.

(2) [1936] Ch. 216.

It follows from the view I have formed as to the conduct of the deceased liquidator that two further questions arise, namely: (i.) What further steps should now be taken to find out whether there are any other, and, if so, what, accrued or contingent claims to compensation on the part of any of the former employees of the company, particulars of whose cases are included in the company's compensation records? (ii.) Whether the unpaid "A" shareholders may not be entitled to claim against the sum retained to provide the deceased liquidator's remuneration and, if necessary, against his estate to make good any loss they will have sustained through the discharge of the whole of any payments or provision to which the four claimants now before the court and any other former employees of the company in similar cases may be found entitled out of those "A" shareholders' proportion of the assets instead of out of the assets as a whole? The second of these questions is not now before me, and I say nothing about it, except that the sum retained to provide the deceased liquidator's remuneration must be kept in hand until the position both as regards the compensation claims and as regards possible claims by these "A" shareholders has been cleared up. On the first question, I was asked in the course of the hearing to give directions in the event of my forming the conclusion I have now reached. I think the present liquidator should now take the steps which, in my judgment, the former liquidator ought to have taken in the first instance, that is to say: He should send a circular letter to every former employee of the company (other than Barkess, the four claimants now before me, the one hundred and forty-one persons covered by the insurance effected in 1938, cases which occurred after the commencement of the insurance effected in 1933, and cases finally settled by lump sum payments) who appears from the company's compensation records to have sustained an accident while in the company's service, and in whose case, either (*a*) a declaration of liability was filed, or (*b*) it appears from the company's records that there was resulting total or partial incapacity for work in respect of which weekly compensation was claimed and paid, addressed to such former employee at his address as stated in the company's records, informing him of the liquidation of the company and instructing him, if he considers he has any further claim against the company for compensation in respect of total or partial incapacity for work (actual or prospective) resulting from the injury caused by the accident, to send particulars of such claim to the liquidator at a specified address by a specified date.

Order that the liquidator do take all practicable steps to ascertain whether an insurance enuring to the benefit of the former employees of the company hereinafter mentioned against the company's liability to such employees under the Workmen's Compensation Acts can be effected, and, if so, at what premium, and in the event of his being unable to effect such insurance on or before October 31, 1947, *do give notice in writing to every former employee of the company (other than the employees whose claims were covered by the insurance effected in* 1938, *and the respondents Mack, Thompson, Orr and Rutherford) in regard to whom it appears from the company's records in the possession or control of the liquidator: (a) that he suffered an accident whilst in the employ of the company and, (b) either that a declaration or acknowledgement of liability was made by the company or that he suffered total or partial incapacity for work for any period in respect of which weekly compensation was paid to him by the company and, (c) that his claim has not been settled by a lump sum payment, such notice to be sent by post addressed to such employee at his address as stated in the company's said records and to inform him of the liquidation of the company and that, if he considers, that he has any further claims against the company for compensation in respect of total or partial incapacity for work actual or prospective resulting from the injury caused by the accident, he should send particulars of such claim to the liquidator at his address, on or before a date to be stated in such notice, such date to be not less than twenty-eight days from the date of posting of the said notice.*

Direct the liquidator to apply the funds in his hands in order of priority and manner following:

1. *In payment of the costs charges and expenses incurred or payable by the liquidator and of such remuneration as the court may think fit to allow to him as such liquidator.*
2. *In or towards payment to the respondents, Mack, Thompson, Orr and Rutherford and to each such employee as aforesaid who shall within the time aforesaid send notice of his claim to the liquidator*

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of the amounts (if any) of the company's liability to such respondents and employees respectively under the Workmen's Compensation Acts. Provided that no part of the sum of 3,500l. appropriated in the company's accounts to the remuneration of the deceased liquidator is to be applied as aforesaid without further order.

Solicitors: *Allen & Overy; Peacock & Goddard; William W. Harden; W. H. Thompson.*

B. A. B.

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July 8, 9.

In re LLOYD EVANS, DECD.

NATIONAL PROVINCIAL BANK *v.* EVANS.

Conflict of laws—Domicile—British domicile of origin—Adoption of Belgian domicile—Residence in Brussels—German invasion—Retreat to France and escape to England—Declaration to notary of Belgian domicile—Will made in England—No intention of settling permanently in England—Death in England—Domicile of choice not abandoned.

A testator born in Wales in 1864, whose parents were British subjects, went to Java in 1880 and lived there until 1917. He married a Dutch woman in 1888, and had three children by her. In 1917 he and his family returned to England by slow stages, but remained there only a short time, going first to Holland and then to Belgium in 1921. He settled in Brussels with his wife and his son and in 1922 purchased a house and later carried on business there. His wife died in 1939, after which he tried to sell his house, but could not do so. On May 10, 1940, the German army invaded Belgium and he was persuaded with reluctance to leave the country and motored to the South of France, escaping to England in June, 1940. While in France he wrote to his notary saying that he was a Belgian citizen, domiciled in Belgium for the last nineteen years, and had intended to make a new will, but had no time to do so. In London he occupied three furnished flats in succession, made a will in English form in July, 1943, and died in July, 1944. The evidence showed that he never intended to remain in England longer than he was obliged, and that during his last years he made conflicting statements as regards his intentions as to residence after the war.

Held (1.) that the onus of proof that the testator had abandoned his domicile of choice lay upon those who asserted that this had occurred; (2.) that although it requires less evidence to establish

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abandonment of a domicile of choice than it does to establish its acquisition, in either event, both the intention and the act must be unequivocal; (3.) that the onus of proof that the testator had abandoned his Belgian domicile of choice had not been discharged; his act in leaving Belgium was dictated by force of circumstances, and was not the result of a free choice; it was, therefore, equivocal; while as regards the period between his arrival in England and his death the probability was that he retained an intention to return to Belgium, and the evidence though inconclusive tended to support the probability.

Udny v. *Udny* (1869) L. R. 1 Sc. & D. 441 applied.

ADJOURNED SUMMONS.

The summons was taken out by the National Provincial Bank as trustees of the will, dated July 22, 1943, of Lloyd Evans, who died in July, 1944. The summons raised various questions as to the construction of the will and the validity of conditions therein contained, but all these were dependent on a preliminary question, namely, whether, at the date of his death, the testator was domiciled in England, or in Belgium or in some other country; for if he was domiciled in Belgium certain dispositions of the will relating to his personal property might be invalid. The evidence, on which the argument mainly turned, and the facts as found by his Lordship appear in the judgment.

G. A. Rink for the plaintiffs.

Raymond Jennings K.C. and *B. S. Tatham* for Captain Evans. On the evidence we submit that the testator never intended to abandon his Belgian domicile. He was compelled to leave Belgium owing to the war, and became a refugee in England. But he never settled down there, and though he talked of going to Australia or South Africa, his ultimate intention was to return to Belgium. *Udny* v. *Udny* (1) and *In re Marrett* (2).

Pascoe Hayward K.C. and *Michael Browne* for the defendants, Mrs. McLean and Mrs. Van den Burgh, daughters of the testator. The testator had definitely abandoned his Belgian domicile. He did not do so immediately, because he left Brussels with reluctance, but he gave up any idea of being able to return to Belgium. He sold his house there and made an English will over here. He had no active intention to return to Belgium and therefore his domicile of origin revived.

P. W. E. Taylor for grandchildren.

(1) (1869) L. R. 1 Sc. & D. 441. (2) (1887) 36 Ch. D. 400.

F. E. Skone James for the defendant Betsy Boers. Abandonment of domicile of choice does not involve an active intention to abandon, but merely a combination of two elements, (*a*) an abandonment in fact, (*b*) the cessation of an active intention to resume and continue residence in the place of choice as a permanent home. This is not inconsistent with *Udny* v. *Udny* (1) because the court in that case were merely giving extreme examples to show the absurdity of the argument that there could be no abandonment of the domicile of choice without the acquisition of a new domicile.

WYNN-PARRY J. The testator was born in the county of Carmarthen on or about January 16, 1864, his parents being both British subjects who had resided in England throughout their lives. He left Europe in the year 1880 and went to reside in Java, where he carried on business as a merchant and where he remained until the year 1917. While he was in Java about 1888, he married a lady of Dutch nationality. He had three children by that marriage, the defendant, Lloyd Edwin Evans—to whom I will refer as Captain Evans—who was born in 1889, the defendant, Mrs. McLean, who was born in 1890, and the defendant, Mrs. Van den Burgh, who was born in 1892. In the year 1917 the testator and his wife left Java and returned to England by slow stages, arriving in this country in the year 1920. Between leaving Java and arriving in England they resided for a period of approximately fifteen months in Australia and for a similar period in California. The testator remained in England for a short time only. He then went to Holland with his wife, where also he only remained for a short time. Eventually he settled in Brussels. In 1922, the testator purchased a house in Brussels, where he resided with his wife and her sister and Captain Evans. It was a large house. The defendant Betsy Boers was housekeeper to the testator and his wife until 1936 when she left owing, apparently, to some difference with Mrs. Evans, the testator's wife. In addition, the testator employed a cook, charwoman and a chauffeur, who acted as a butler in the house. He purchased a factory in Belgium where for some years he carried on a business, as to the nature of which the evidence does not speak. Later he sold the business but let the factory and retained the ownership of it until his death.

The testator had many friends in Brussels. He was a member of the Union Club in the city and he gave a good deal of time to assisting the British Ex-Service men in Belgium. In 1923 he opened and maintained a banking account at the Brussels branch of the Westminster Bank. The testator for many years before his death suffered from diabetes and, at any rate, during the latter part of his residence in Belgium, was under medical treatment. According to the evidence of Captain Evans, which was not challenged, the effect of this disease was to make him averse to travelling and staying away from his home. In 1938, the testator's sister, who was living with the testator and his wife, died; on July 13, 1939, the testator's wife died and, in August, 1939, the testator purchased a plot of land in a cemetery near Brussels in which his wife was buried and in which it was is intention that he and his son, Captain Evans, should also be buried. Shortly after his wife's death the testator put up his house in Brussels for sale. The reason why he did so, according to the evidence of Mrs. Louise Evans, the wife of Captain Evans, which I accept, was partly because he thought the house contained too many memories of his wife and partly because it had become too large for him. He proposed to take a flat in Brussels. In the event, however, he found himself unable to sell the house at a price which was satisfactory to him and he remained in the house until he left Belgium in 1940. On May 1, 1940, Miss Boers returned to the testator's service as his companion and secretary. On May 10, 1940, the Germans invaded Belgium. With great difficulty the testator was persuaded by his daughter-in-law, Mrs. Louise Evans, to leave Brussels. At first he refused to do so. It was put to him that if he stayed he was likely to be placed in a concentration camp. At first he would not listen to the suggestion, but eventually, after very considerable persuasion by his daughter-in-law, he consented to leave and he and Mrs. Louise Evans and Miss Boers went first by the testator's car, driven by his chauffeur, to Ostend. Then, finding that they could not cross to England, they went to Perigueux in the south west of France, where Captain Evans had a house. The testator's attitude when he arrived at Perigueux is made clear by the evidence of Captain Evans. The testator fully intended to remain there and he took steps to acquire a quantity of provisions upon the basis that he was confident that that part of France was safe from invasion and that he and his son and daughter-in-law could stay there for the duration of the war. While in the south of France the testator wrote out a document addressed to his notary, the material part of which reads as follows: "Although I am British by birth since my sixteenth

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(1) L. R. 1 Sc. & D. 441

"year I have never lived in England and having been domiciled "in Belgium the last nineteen years I am a citizen of Belgium, "while I am here as a refugee, having arrived in France from "Brussels on May 12 last. Unfortunately, I have no will, "as I waited to make a new one until after dear mother's "succession had been settled. I was thinking of making one "here, in France, but being now more or less under sailing "orders, there is no time to do so." The reference to his being more or less under sailing orders is explained by the circumstance of the successful invasion of France by the German armies. After certain vicissitudes, including an unsuccessful attempt by Captain Evans, the testator and Mrs. Louise Evans to sail from Bordeaux, they were successful in reaching Bayonne from which port they sailed to England, arriving in Plymouth in June, 1940, accompanied by Miss Boers. Captain Evans had been an officer in the regular army and on arriving in England he rejoined the army, with the result that until the testator's death in 1944 he had few opportunities of seeing his father. Mrs. Louise Evans, his wife, obtained employment in Scotland where she remained, at any rate, until the end of the year 1943, so that she also had little opportunity of conversations with the testator during the intervening period.

It is clear, from the evidence, that the testator had no intention of settling in England or, indeed, of remaining in this country longer than he need. Indeed, one of his own acts on arriving in this country was to endeavour to obtain permission to go to California, in which endeavour, however, he was unsuccessful owing to difficulties which arose by reason of the Defence (Finance) Regulations. The testator, in those circumstances, had to reconcile himself to remaining in England during the rest of the war, and, with Miss Boers as his companion and housekeeper, he occupied successively three furnished flats in London until his death, which occurred in July, 1944. As I have said, owing to the absence of Captain Evans and his wife they are unable to throw any real light on the testator's intentions as regards his future home during the material period between his arrival in England and his death. The evidence on this part of the case consists really of the affidavit and oral evidence of the daughter, Mrs. McLean, Miss Betsy Boers and the oral evidence of an official of the Westminster Bank, a Mr. Johnstone. Mrs. McLean furnished certain information to officials of the National Provincial Bank (who are the executors and trustees of the will of the testator) the plaintiffs to this summons, which was eventually embodied in an affidavit sworn by Mr. Wynne, the manager of the Trustee Department of that bank. The evidence which was put forward as a result of what Mrs. McLean and Miss Boers told the officials of the bank, or their solicitors, was to this effect, that during his last years he frequently told Miss Boers and Mrs. McLean that when the war was over he intended to travel in the southern hemisphere. He proposed to go first to South Africa and then to Java and Australia. Although he did not say so in so many words, they gathered that he intended to make his home in Australia. He continually spoke about Australia, the climate and the people, in a way which made it clear that he intended to settle in Australia after the war and not merely to visit it. The oral evidence of Mrs. McLean did not, in my view, take that evidence any further. Miss Boers, in an affidavit sworn by her in this matter on May 16, 1947, says: " During this time "—that is, while the testator and she were living in furnished flats in London—" the said Lloyd Evans repeatedly discussed his " future plans with me. At first, the said Lloyd Evans was " undecided as to where he wished to spend the rest of his life, " but during the last two or three years he made it clear that he " had decided on Australia. He repeatedly told me that I would " like life in Australia and his intention was that I should " accompany him there." I have had the advantage, and it is necessarily always an advantage to a judge, of having both those witnesses in the witness box. I find Mrs. McLean an entirely satisfactory witness though, as I say, she did not, so far as the question of the testator's intention is concerned, take the matter any further than it is taken in the affidavit of Mr. Wynne, to which I have referred. Miss Boers was much more definite and in cross-examination she went so far as to say that the testator said to her in terms that he wanted to make his final home in Australia. I do not find Miss Boers such a satisfactory witness. I took care to observe the way in which she gave her evidence, and, though I acquit her of any intention to mislead the court at all or to say anything which she did not believe to be true, the impression I got of her was that of one who was an advocate in her own cause, and I cannot place complete reliance on the evidence which she gave me. Particularly I would add, and I bear this in mind in assessing the weight to be given to her evidence, that she is a beneficiary under the testator's will, to the terms of which I must refer later, and is, therefore, to some extent interested in the matter.

On the other hand, I have the advantage of the evidence of Mr. Johnstone, who was an entirely independent witness. He knew the testator from the year 1923, having throughout the whole of that period, from then until 1940, been employed by the Westminster Bank in Brussels. The relation between him and the testator was much more than that of a customer and his banker or employee of his bank. Mr. Johnstone told me, and I accept the whole of his evidence, that the testator took a considerable interest in his career and he came to look upon him as a second father. The testator, from time to time, took Mr. Johnstone to the Union Club in Brussels as his guest, and it is perfectly clear that there was a considerable friendship between the two men. After the testator came to England, to which also Mr. Johnstone came in the summer of 1940, they saw a good deal of each other, both at the bank where Mr. Johnstone was employed and frequently at lunch. There was, throughout the period, a lunch party held every month which was attended by members of the Union Club of Brussels and their guests. It was really a monthly re-union of a number of persons who were, or who regarded themselves as, refugees from Belgium. The testator was a frequent and, indeed, regular attendant at those lunches and, as I gather from his evidence, Mr. Johnstone frequently attended. The chief topic of conversation at those lunches was the question of going back to Belgium at the end of the war. According to Mr. Johnstone's evidence, it was everybody's firm hope and intention that this should happen. He included the testator as holding that hope and intention. He made it clear that the testator never suggested to him that he had any intention of settling or making his home in any other country. He particularly remembered a conversation which he places in July of 1941 or 1942, at a reception given by the Belgian Government, where the testator said quite definitely that he was looking forward to going back to Belgium. Comment on this was very properly made by counsel for those whose interests it is to argue that the testator's domicile at his death was English that, although Mr. Johnstone's memory was quite definite as to that reception, he could only speak in general terms about the latter part of the period. But the impression which I got from his evidence, and the conclusion to which I come after listening to that evidence, is that the testator, in so far as Mr. Johnstone was concerned, continued throughout his association and friendship with Mr. Johnstone to express the hope that he would go back to Belgium.

On July 22, 1943, the testator made his last will. The will is in English form and was obviously prepared by a professional adviser. In it he describes himself as of Kenilworth Court, Lower Richmond Road, Putney, formerly of 258, Latymer Court, Hammersmith Road. Those are the last, and the last but one of the three furnished flats which the testator occupied after his arrival in England. By the will he appointed the plaintiffs to be his executors and trustees. He then made a certain specific bequest, and certain pecuniary bequests, one of them being of 500*l.* to Miss Boers, another to the British Legion of Cardigan Lodge, Richmond Hill, of 200*l.* to be held or applied by them so as to benefit their branch in Brussels. By cl. 6 he desired the bank without fettering their discretion to consult with his broker in Amsterdam and another gentleman in Amsterdam concerning the realization of his assets in Holland or in Dutch possessions. Then, after the usual administration trusts, he constituted the residuary estate and directed by cl. 8 that it should be divided in the following shares, as to 40 per cent. for his daughter, Mrs. McLean, as to 35 per cent. for his daughter, Mrs. Van den Burgh, as to 10 per cent. for Captain Evans, and as to the remaining 15 per cent. for Miss Boers if still in his employment, as she was in the events which occurred. He then proceeded to settle the various shares, and into the details of those trusts I need not enter. He gave the bank, by cl. 15, the power of appropriation conferred upon a personal representative by s. 41 of the Administration of Estates Act, 1925. By cl. 17 he provided " If any person shall without the " consent in writing of the bank, to give or refuse which shall be " in its absolute discretion, dispute the validity of or refuse to " confirm this my will or any codicil hereto if required so to do " by my executors " such person should forfeit all benefits under his will. It is clear, as I have said, that that is a will in English form, and that is a circumstance which, among other circumstances, has to be taken into consideration for the purpose of deciding the question which I have to decide.

That appears to me to be all the relevant evidence on the question of domicile. On that evidence counsel for the parties in whose interest it is to argue that the testator's domicile was English were very properly constrained to admit that the testator had lost his English domicile of origin and had acquired a Belgian domicile of choice. No question arises as to the acquisition of a new domicile of choice elsewhere than in Belgium, and the question, therefore, is narrowed to this: in the circumstances which I have stated did the testator retain his domicile of choice, or did he abandon that domicile, so reviving his English domicile of origin?

Before considering the true inference to be drawn from the facts it will be convenient to refer, quite shortly, to two authorities which seem to me to be relevant on this point. The first is *Udny* v. *Udny* (1). On p. 450 the Lord Chancellor, Lord Hatherley, says this: " It seems reasonable to say that if the " choice of a new abode and actual settlement there constitute " a change of the original domicile, then the exact converse of " such a procedure, namely, the intention to abandon the new " domicile, and an actual abandonment of it, ought to be " equally effective to destroy the new domicile. That which " may be acquired may surely be abandoned, and though a man " cannot, for civil reasons, be left without a domicile no such " difficulty arises if it be simply held that the original domicile " revives. That original domicile depended not on choice " but attached itself to its subject on his birth, and it seems to " me consonant both to convenience and to the currency of the " whole law of domicile to hold that the man born with a domicile " may shift and vary it as often as he pleases, indicating each " change by intention and act, whether in its acquisition or " abandonment; and further, to hold that every acquired " domicile is capable of simple abandonment animo et facto, " the process by which it was acquired, without its being " necessary that a new one should be at the same time chosen, " otherwise one is driven to the absurdity of asserting a person " to be domiciled in a country which he has resolutely forsaken " and cast off, simply because he may (perhaps for years) be " deliberating before he settles himself elsewhere." Then it was observed by Lord Chelmsford in his opinion (2): " I cannot understand upon what ground it can be alleged that " a person may not abandon an acquired domicile altogether " and carry out his intention fully by removing animo non " revertendi; and why such abandonment should not be " complete until another domicile is acquired in lieu of the one " thus relinquished." On p. 458, Lord Westbury says: " Domicile of choice is a conclusion or inference which the law " derives from the fact of a man fixing voluntarily his sole or " chief residence in a particular place, with an intention of " continuing to reside there for an unlimited time. This is a " description of the circumstances which create or constitute

(1) L. R. 1 Sc. & D. 441, 450.

(2) Ibid. p. 453.

"a domicile, and not a definition of the term. There must be a "residence freely chosen, and not prescribed or dictated "by any external necessity, such as the duties of office, the "demands of creditors, or the relief from illness; and it must "be residence fixed not for a limited period or particular "purpose, but general and indefinite in its future contemplation. "It is true that residence originally temporary, or intended for "a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, "or animus manendi, can be inferred the fact of domicile is "established. The domicile of origin may be extinguished "by act of law, as, for example, by sentence of death or exile "for life, which puts an end to the status civilis of the criminal; "but it cannot be destroyed by the will and act of the party. "Domicile of choice, as it is gained animo et facto, so it may be "put an end to in the same manner. Expressions are found "in some books, and in one or two cases, that the first or existing domicile remains until another is acquired. This is true "if applied to the domicile of origin, but cannot be true if such "general words were intended (which is not probable) to "convey the conclusion that a domicile of choice, though "unequivocally relinquished and abandoned, clings, in despite "of his will and acts, to the party, until another domicile has "animo et facto been acquired. The cases to which I have "referred are, in my opinion, met and controlled by other "decisions. A natural-born Englishman may, if he domiciles "in Holland, acquire and have the status civilis of a Dutchman, "which is of course ascribed to him in respect of his settled "abode in the land, but if he breaks up his establishment, sells "his house and furniture, discharges his servants, and quits "Holland, declaring that he will never return to it again, and "taking with him his wife and children, for the purpose of "travelling in France or Italy in search of another place of "residence, is it meant to be said that he carries his Dutch "domicile, that is, his Dutch citizenship, at his back, and that "it clings to him pertinaciously until he has finally set up his "tabernacle in another country? Such a conclusion would be "absurd; but there is no absurdity and, on the contrary, "much reason, in holding that an acquired domicile may be "effectually abandoned by unequivocal intention and act; "and that when it is so determined the domicile of origin "revives until a new domicile of choice be acquired." In a later case of *In re Marrett* (1), Cotton L.J.,

(1) 36 Ch. D. 400, 407.

says this: "The law, as I understand it is this, that "the domicile of origin clings to a man unless he has "acquired a domicile of choice by residence in another place "with an intention of making it his permanent place of "residence. If a man loses his domicile of choice, then, without "anything more, his domicile of origin revives; but, in my "opinion, in order to lose the domicile of choice once acquired, "it is not only necessary that a man should be dissatisfied with "his domicile of choice, and form an intention to leave it, "but he must have left it, with the intention of leaving it "permanently. Unless he has done that, unless he has left it "both animo et facto, the domicile of choice remains. It may "be lost animo et facto, and if lost, then, the domicile of origin, "there being no other domicile, revives and attaches again; "but the mere fact that a man when he has once acquired a "domicile of choice begins to doubt whether he has done right "or wrong, whether it would not have been better for him not "to have taken up his residence in that country, does not "destroy the effect of the residence taken up with the intention "of permanently residing there."

Mr. Pascoe Hayward, whose argument was adopted by the other counsel in whose interests it is to have it established that the testator's domicile at the date of his death was English, submitted, first, that the proper inference from the evidence in this case is that the testator had definitely made up his mind that he would not return to Brussels as his permanent home. I agree that if that is the true inference from the evidence, then the effect of that intention, coupled with the fact of having left Brussels, even in the circumstances in which he did leave Brussels, amounts to an abandonment of the Belgian domicile of choice. I have stated the evidence at some length, and I do not propose to traverse the ground again in any detail for the purpose of coming to a conclusion as to whether or not that evidence is justified, but there are certain matters in the evidence to which I must refer. It is perfectly clear that but for the incidence of the war there is no ground for suggesting that the testator would ever have left Belgium in the sense of giving up his permanent home there. It is clear to me from the evidence that when he left he did so with reluctance and under the pressure of circumstances. I do not regard him as really having had a free choice in the matter. When he did leave it was because he regarded it simply as the lesser of two evils. Then I must take note of the circumstance that, having to go the south of France, he hoped, and for a time intended, to stay there until the end of the war, and while he was there brought into existence the document which I have read in which he asserted categorically his Belgian domicile and indicated perfectly clearly, that at any rate at that time, his intention was to retain his Belgian domicile. Next I must take into consideration the admitted fact that he never intended to settle in England, and, further, that throughout the material period he never had an opportunity of returning to Brussels. In addition one must bear in mind that the testator when he reached England was of the advanced age of seventy-seven years, and, to my mind, prima facie, one would conclude that he would be more likely, if able, to return to Brussels and take up his life again there than to go elsewhere further afield, it being admitted that he had no desire to remain, or any intention of remaining, in this country. Against that it is suggested that he would be disinclined to return to Brussels because he must have foreseen and anticipated that the position in Brussels at the end of the war, assuming, of course, a successful conclusion to the war, would be quite different from the position to which he was accustomed before the war. He had put up his house for sale. It was unsuitable. He would have to face establishing a new residence there and his family was scattered. His Dutch, Belgian and English friends might still be scattered, and he would have to take up again the threads of social life. On those grounds it is suggested that it is more likely that, notwithstanding his advanced age, he would turn his eyes to the other end of the world and set out on what would necessarily be a very long journey, not to go back to Java where he had spent twenty-seven years of his life but to Australia where, according to the evidence, he knew few people —only two or three were mentioned—and where he had only spent a comparatively short period of fifteen months. So far as the probabilities of the matter are concerned, I would much doubt whether a man in those circumstances would, during the course of a war without waiting for its outcome and, therefore, for the opportunity of seeing what the position would be in Brussels which had been his home for so long, take a final decision never to return to Brussels as his permanent home but to go to Australia. There are, however, the declarations which he made during these latter years, and if they stood alone there might be sufficient ground for drawing the inference against what I hold to be the probability, that he had finally changed his mind and decided to make the long journey to Australia and settle there instead of going back to Brussels. But those declarations do not stand alone. Against them must be set the evidence of Mr. Johnstone, and I have come to the conclusion that, weighing up the evidence which is before me, the parties who contend that the testator's domicile was English at the date of his death have not upon this part of the case discharged the onus of satisfying me that the testator had definitely made up his mind that he would not return to Brussels as his home.

It was then submitted that if I were to take that view, as I have done, the proper inference from the evidence was that the testator had ceased to intend to make Brussels his home to the exclusion of all other countries or, as Mr. Pascoe Hayward subsequently developed that proposition, that the evidence shows that the testator did not intend to live in Brussels to the exclusion of all other countries. He submitted that if that was the true inference from the evidence that was sufficient to conclude the matter in his favour because that showed that he no longer had the intention of retaining his domicile of choice. In my judgment that proposition is not a sound proposition. The effect, in my view, of the authorities to which I have referred is that just as it is necessary for the purpose of acquiring a domicile of choice, thus placing the domicile of origin in abeyance, to demonstrate the acquisition by unequivocal intention and act, so for the purpose of abandoning the domicile of choice it is essential to demonstrate that abandonment by unequivocal intention and act. The only real difference in law between the two cases of acquiring a domicile of choice and, placing the domicile of origin in abeyance, on the one hand, and abandoning a domicile of choice, on the other hand, is that less evidence is required to establish the act of abandoning the domicile of choice than is required to demonstrate the acquisition of a domicile of choice. But in either event both the intention and the act must be demonstrated to be unequivocal. Taking first, in this case, the act, namely, the act of the testator in leaving Brussels, that appears to me upon the evidence to be an entirely equivocal act so far as the question of abandonment of the domicile of choice is concerned. It was not, in my view, a free choice. So far as the element of intention is concerned, it must be remembered that what has to be demonstrated is a change of intention. In my view a change of intention, that is an intention to abandon the domicile of choice, is not demon-

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strated by evidence which, at its highest, shows no more than that from time to time the testator expressed different views as to his intention for the future to different people. I cannot find, upon the evidence in this case, any evidence of a sufficiently cogent or final character to enable me to come to the conclusion that this testator intended by that act to abandon his domicile of choice. It is, and must remain, a matter of speculation as to what really was his state of mind. I think probably the true view is that this old gentleman placed in these unfortunate, and, having regard to his age and associations, strange circumstances, quite naturally during the last few years of his life was very often in two minds as to what he was going to do when the war came to an end. That is quite insufficient to establish an unequivocal intention to abandon his domicile of choice.

For these reasons, therefore, I hold that the second proposition is not established, and that, in the result, the onus of proof which is cast on those who say that the testator lost his domicile of choice and, therefore, revived his domicile of origin has not been discharged. I, therefore, hold that the testator's domicile at the date of his death remained Belgian.

Declaration accordingly.

Solicitors: *Marsden, Burnett & Davy; Henry Hilbery & Sons; Stoneham & Sons.*

H. L. L.

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1947

July 24, 25, 30.

HINES *v.* WINNICK.

Passing off—Professional name—Plaintiff a musician—Broadcasts for defendant as "Dr. Crock and his Crackpots"—Name identified with plaintiff—Part of his stock in trade—Right to restrain defendant from using name.

The defendant was responsible for the production of a sketch broadcast weekly by the British Broadcasting Corporation under the name "Ignorance is Bliss." That sketch was interspersed with tunes played in a burlesque manner. The defendant employed the plaintiff to conduct and play in the orchestra providing this music. At the defendant's request and against his own wishes the plaintiff broadcast not under his own name but as "Dr. Crock and his Crackpots." He was responsible for the orchestration and arrangement of the music so broadcast and he had built up a considerable reputation with the public for his broadcasts as " Dr. Crock." The defendant claimed to be entitled to employ some person other than the plaintiff to continue the broadcasts as " Dr. Crock and his Crackpots."

Held, that the name " Dr. Crock " had become part of the plaintiff's stock in trade and identified with him and that the plaintiff was entitled to an injunction restraining the defendant from passing off any musical act under the designation " Dr. Crock " and his Crackpots " as and for the plaintiff's musical performance. *Landa* v. *Greenberg* (1908) 24 T. L. R. 441, considered.

Held also, that the plaintiff was as between himself and the defendant entitled to the copyright in the music composed or arranged by him and broadcast under the name " Dr. Crock and " his Crackpots."

WITNESS ACTION.

The plaintiff, Henry Albert Hines, commonly known as Harry Hines, was a professional musician. He specialized in the composition and arrangement of burlesque music, and was an expert in conducting such music. He also performed on a variety of instruments, including the clarionet. The defendant, Maurice Winnick, was largely responsible for an item in the programme of the British Broadcasting Corporation, known as " Ignorance is Bliss," transmitted in the Light Programme each week. These broadcasts were produced from a script which consisted in part of humorous dialogue and in part of tunes played in a burlesque manner which were designed from their inconsequence and eccentricity to accord with the dialogue.

The orchestra of Mr. Sid Millward had been employed to play the music for " Ignorance is Bliss." When the engagement of that orchestra was terminated, the defendant approached the plaintiff and asked him whether he would, with a company of musicians, take the place of Mr. Sid Millward and his orchestra. The plaintiff was displeased that instead of being described by his own name, as Mr. Millward had been, the defendant wanted him to broadcast under the semi-comic name of " Dr. Crock and his Crackpots." The plaintiff however gave way and he consented to broadcast as "Dr. Crock."

The plaintiff, with the company of musicians, started broadcasting as " Dr. Crock and his Crackpots " on March 3, 1947, and continued weekly broadcasts until some date in May, 1947. He both conducted the orchestra and played in it. The performances took place in the B.B.C. theatre before a small audience. The plaintiff was responsible for the arrangement and orchestration of the music broadcast. After a few performances the name " Dr. Crock " became identified and associated with the plaintiff. Various appreciative references to the plaintiff appeared in the press, the identity of Dr. Crock with the plaintiff being clearly recognized.

The defendant claimed that he was entitled to continue the production of " Ignorance is Bliss", including a performance by " Dr. Crock and his Crackpots ", but employing some person other than the plaintiff as Dr. Crock. In this action, the plaintiff claimed a declaration that he was the owner of the copyright of the music broadcast under the name " Dr. Crock " and an injunction to restrain the defendant from passing off any act under the name " Dr. Crock and his Crackpots " or under any name colourably differing therefrom as and for the plaintiff's musical act.

Aldous for the plaintiff. The plaintiff has built up a reputation under this name " Dr. Crock." That name has become the admitted professional name of the plaintiff. To the public Dr. Crock means the plaintiff. The case is similar to that of *Landa* v. *Greenberg* (1). The plaintiff has built up a business under the name Dr. Crock, which he is entitled to have protected. He is not claiming a monopoly in the name. All he asks is an injunction to prevent the defendant passing any broadcast or stage performance under the name " Dr. Crock." He is also entitled to the copyright in the music broadcast as it was arranged by him.

Milner Holland for the defendant. This is merely the case of a fictitious character known as " Dr. Crock ", which was played by the plaintiff. An actor who takes a part in a play cannot object to another person performing that part. This is the same case.

VAISEY J. [stated the facts and continued :] There can be no doubt at all that " Dr. Crock ", as the name of an individual, became, at any rate after a few performances, associated and identified with the plaintiff. I have, for example, an issue of the *Radio Times*, described as the journal of the B.B.C., dated May 16, 1947, and on p. 7 of that issue there is a picture, admittedly the picture of the plaintiff, got up in the fancy dress in which he conducted his orchestra and joined in producing this music, which is described as: " Professor Crock, in the " splendour of full dress, gets the worst out of his orchestra."

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(1) (1908) 24 T. L. R. 441.

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In addition to that, certain appreciative references appeared in the press, in which the identity of Dr. Crock with the plaintiff is clearly indicated, showing that to those who read those articles and to those who wrote them that identity was clear.

It seems to me, in all the circumstances of this case, that Dr. Crock, whether the plaintiff liked it or not, became the admitted theatre name or professional description of the plaintiff. Such reputation, for good or evil, as was obtained from these broadcasts attached to the plaintiff and to no one else. During the period of the plaintiff's broadcasts, which extended from March 3, 1947, to some date in May, 1947, a reputation was built up for the plaintiff in the name of Dr. Crock. I have in this action to deal with the consequences which flow from that reputation.

The case put for the defendant is that " Dr. Crock and his " Crackpots " is a purely fanciful name, that anybody could perform as " Dr. Crock and his Crackpots," and that there is no right in the plaintiff either to a monopoly of the name of Dr. Crock, or to prevent the intrusion into broadcasts of a Dr. Crock, who is some person other than the plaintiff. I think that if Dr. Crock had at the inception of these broadcasts on March 3, 1947, been a recognized appellation of some character —I instanced during the hearing of the case the name of " Colonel Blimp," or in older days " Ally Sloper "—there would have been a good deal to say in favour of the view put forward by the defendant. If at that date Dr. Crock had been a name already in existence, I think it might well have been that anybody would be entitled at the will of the producers of this show to be put forward as the man taking the part of Dr. Crock. That however, is not my view of this case. It seems to me that by force of circumstances, and by the arrangements to which the defendant was a party, the plaintiff was obliged to take, or at any rate did take, the name of Dr. Crock for the purposes of these performances.

The defendant was asked by me how he would regard similar, though less fanciful, descriptions of orchestras or bands associated with the name of one man. Some dozen names were taken from the current issue of the *Radio Times*, as to which the defendant, with perfect frankness, said that if, for instance, he was told that Duke Ellington and his orchestra were to perform, he would expect the gentleman known as Duke Ellington to be the conductor of it, and it would not be fair to the public, or fair to Mr. Duke Ellington, to advertise

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a performance by Duke Ellington and his orchestra if any person other than Duke Ellington were in charge of it, and so with other names. I took another example. There is an orchestra or dance band called Jose Norman and his Rumbaleros and I think the defendant admitted, and I should certainly hold, that Jose Norman and his Rumbaleros means the gentleman called Jose Norman and certain performers of whom he was in charge, and so with other similar instances—Mantovani and his orchestra, Billy Ternent and his orchestra, and Leslie Perry's Orchestrette. It does not seem to me to make the slightest difference that the name attached to the plaintiff in connexion with these weekly performances between March 3, and the middle of May is a name which is obviously fanciful. I cannot for myself see that the plaintiff is not entitled to say: " Under this name, Dr. Crock, I have, through broadcasts and " by what was seen as well as heard in the theatre, established " a reputation for my performance." If that is so, it would not be fair or right for any other person to be put before the public under the name of Dr. Crock who is not the plaintiff, whose association with the name is the only association, at the date of the writ, which belonged to it.

I think that some guidance is given to me by the decision of Eve J. which was cited to me by Mr. Aldous, in the case of *Landa* v. *Greenberg* (1). That was a case of a nom de plume. A certain Mrs. Landa contributed to a periodical articles under the pen-name of " Aunt Naomi," and the learned judge said in that case: " I am bound to hold that the plaintiff had a good " cause of action in respect of the defendant's conduct. The " name "—that is, the name of Aunt Naomi—" constituted " part of her stock-in-trade as a writer, and that it had become " identified with her was the very reason the defendant put " forward for dismissing her, and the defendant was not con-" fining himself to a mere denial of her right, but was himself " making use of it in a way calculated to lead to the belief that " the league into which the applicants for membership were " being admitted was still being conducted by her." Translating that into the language which would be appropriate to the present case, I have come to the conclusion that the name " Dr. Crock " has become part of the plaintiff's stock-in-trade, and that it has become identified with him, and it is not open to the defendant to make use of that name in connexion with any person other than the plaintiff, or in connexion with any such performance as that in which the plaintiff took part. It may well be that in some wholly different subject-matter, for instance, " The War Reminiscences of Dr. Crock," or some literary work, there would be no infringement of the plaintiff's right, but in connexion with the performance of music, and particularly burlesque music, it seems to me that this fanciful name, this nom de theatre of the plaintiff, has become part of his stock-in-trade and identified with him.

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(1) 24 T. L. R. 441.

After all, we are not dealing here with a wholly commercial matter. We are dealing with a personal matter connected with an art, and, if a man, be he musician, portrait painter or writer of articles in newspapers, gets to be known under a particular name, that name becomes inevitably part of his stock-in-trade, and apart from some special contract or anything of that kind, he is entitled to say that it is his name, and that anyone who adopts or causes the adoption of that name by some other person is inflicting upon him an injury. As was pointed out by Eve J. in the case to which I have referred, he was not dealing with the alleged misuse of the name of a private individual, but of an authoress and journalist, a state of things to which wholly different rules must be applied. " The name in such a connexion," said Eve J., " constitutes part of the owner's stock-in-trade, and its " use without his or her authority may inflict grievous harm " and result in pecuniary loss." " Aunt Naomi " was the fanciful name adopted by Mrs. Landa. " Dr. Crock " is the fanciful name adopted by the plaintiff, and I have great difficulty in seeing the difference between the facts which were before Eve J. in that case, and the facts with which I have to deal in this case.

It was said, on behalf of the defendant, that after the termination of the plaintiff's association with " Ignorance is Bliss," it would have been open to him to say that " Professor " Crock and his Crackpots " meant any conductor of music and any band of musicians who happened, at the time, to be playing under that designation; but, in my view, that argument really reveals the unsubstantial nature of the defendant's case, because if " Professor Crock and his Crackpots " merely means those particular performers who, good or bad, were pretending to be " Professor Crock and his Crackpots," it seems to me to be an assertion that anybody could call himself " Professor Crock and his Crackpots," or, at any rate, some person other than the plaintiff, and that appears to me to be in contradiction to the facts of the case, and an argument to which I am unable to accede.

I am sorry that this case has had to come to trial, because it is in evidence before me that these two persons, who combine to amuse the public at a time when amusement of the public is not an undesirable aim to pursue, were up to the time of this dispute good friends, and I should like to say that there is nothing, so far as I know, in the way in which this action has been conducted, or in the way in which the dispute has arisen, which reflects any discredit upon either of them. I regard the matter rather as one in which the defendant has mistaken his rights, and it may be also one in which the plaintiff was none too sure of the exact ground upon which he stood.

Turning to the pleadings, I find first of all an allegation that the plaintiff was entitled to the copyright in something described as " a musical act under the name ' Dr. Crock and his Crack- " ' pots '." I venture to think that the framer of that pleading was not so well aware as he is now of the exact nature of the performance known as " Ignorance is Bliss " ; but I do not think it can be disputed that there is some copyright here, that is to say, that the plaintiff has a copyright in the arrangements which he broadcast during the performances in question. Whether a declaration to the effect that such a copyright exists in the plaintiff can do him much good, I am not very clear. The declaration is only a declaration of his right as between himself and the defendant, but it seems to me, and, indeed, I do not understand that it is disputed by the defendant, that the arrangement, orchestration and lay-out of this burlesque music is something in which there is undoubtedly some copyright in the plaintiff, and in which the defendant himself has no such interest.

If it were not for the fact that the issue of copyright has been boldly and unreservedly put in issue in the defence, I should have hesitated to make any order in regard to that part of the claim, but as the defence seems to suggest that there is no copyright in this music in the plaintiff, I think I ought to make a declaration that the plaintiff is entitled to copyright in the music composed, or de-composed, by his skill and art.

The rest of the action, apart from copyright, is based, I suppose it is accurate to say, on the plea of passing-off. The essence of passing-off in this sort of matter is the representation that someone, other than the plaintiff, is filling the part which the plaintiff alone is entitled to fill. I do not think

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the plaintiff has any right to a monopoly in the use of the word "Crackpots." I do not know that he has any monopoly in the use of the words "Dr. Crock," though I am bound to say that applicants for the privilege of using that name are unlikely to be very numerous or insistent. I think the plaintiff is entitled to an injunction restraining the defendant from passing off any musical act under the designation of "Dr. Crock and his "Crackpots," or under any name only colourably differing therefrom, as and for the plaintiff's musical performance.

I am asked to order an inquiry as to damages, but I do not propose to do so. It has not been suggested that the plaintiff has, in fact, incurred any damage. He may have done so, but it may also be that the plaintiff has gained something by the publicity which this action has attained, and it may also be that when the parties have been assured as to what their rights are, they will find that not much harm has been done. All the same, I think that the defendant's claim to say, as in fact he does, that Dr. Crock has nothing at all to do with the plaintiff, except so long as the defendant thinks proper to allow it, is not well founded. Having given the plaintiff the name of Dr. Crock, against the plaintiff's original wish, I think the name must be considered to have stuck to the plaintiff, and that the plaintiff has acquired rights in it as his professional name for the time being. There can be no objection to the plaintiff continuing to call himself "Dr. Crock," though I should feel grave objection to his describing himself as "Dr. Crock" in association with the word "Crackpots." His sole rights are to be the original and only Dr. Crock for the purposes of the performance of burlesque music, and the defendant is not entitled to hold out as Dr. Crock or as the Dr. Crock any person other than the plaintiff himself.

I will grant an injunction restraining the defendant, his servants and agents from passing off any musical act under the designation "Dr. Crock and his Crackpots" or under any name only colourably differing therefrom as and for the plaintiff's musical performance, together with a declaration that the plaintiff is entitled to the copyright in the music composed or arranged by him and broadcast under the name of "Dr. Crock and his Crackpots."

Judgment for the plaintiff.

Solicitors: *Hall Clark & Goldhawk & Jutsum & Co.; Rubenstein, Nash & Co.*

B. A. B.

Decision of WYNN-PARRY, J., *reversed in part.* [1948] 2 All E.R. 318.

WYNN-PARRY J.

1946

Nov. 26, 27, 28, 29; *Dec.* 3, 4, 5, 6, 10, 11, 12, 13, 18, 19.

1947

Mar. 11; *Apr.* 1.

In re DIPLOCK. DIPLOCK *v.* WINTLE (AND ASSOCIATED ACTIONS).

Administration—Mistake in construction of will—Mistake of law—Executors wrongly distribute residue between charitable institutions—Distribution made by cheque—Liability of Charities to next of kin—Claim for money had and received—Right to follow at common law—Application of equitable doctrine of tracing.

The testator by his will gave the residue of his property to his executors upon trust to sell the same and to divide the net residue "between such charitable institution or institutions, or "other charitable or benevolent object or objects" as his executors might, in their absolute discretion, think fit. The testator died on March 23, 1936, and his will was proved by three executors. During the years 1936, 1937 and 1938, the executors distributed over 203,000*l.* between some one hundred and thirty-nine charitable institutions. In each case payment was made by cheque and the recipient institutions paid the cheques into their respective accounts. In most cases the institutions paid the cheque into a general account. In some cases, however, the payment was made to a special account. Where payment was into a general account, which was overdrawn at the time of payment in, the banks concerned were for the most part unsecured. In some cases, however, the institution's account was secured by a charge on its assets. In a few cases the executors made it a condition of the grant that the money paid should be applied for a particular purpose, either for building or providing equipment for the institution. In September, 1939, the executors were notified that the testator's next of kin challenged the validity of the testator's residuary gift. In October, 1939, the executors' solicitors wrote to each of the institutions informing them that the validity of the payments to them was challenged. An originating summons was issued in 1940 to have the will construed. It was held by the House of Lords in June, 1944, in *Chichester Diocesan Fund and Board of Finance* (*Incorporated*) v. *Simpson* [1944] A. C. 341, that the trusts of the residuary estate of the testator were void for uncertainty.

The next of kin in these proceedings sought a declaration that the charitable institutions were liable to refund the moneys so paid to them. The plaintiffs admitted that it was not open to them in a court of first intance to contend that the defendant institutions took with notice of the trust.

Held, first, that the rule that the common law action for money had and received was only available where the plaintiff had paid under a mistake of fact was of general application and was not dependent upon the pre-existence of a contract between the parties. The mistake upon which the executors acted was either a mistake as to the technical requisites for the creation of a valid charitable trust, alternatively, it was a mistake as to the construction of the testator's will. In either case the mistake was one of law.

Accordingly, the plaintiff's claim for money had and received failed.

Secondly, that the plaintiffs had not in equity a personal claim against the charitable institutions for the amount of the sums paid to them. Where a personal representative had paid money or transferred property, part of the estate of the deceased, to a person not entitled thereto, in such circumstances as not to make the receipient an express trustee, the only remedy of the person rightfully entitled was either to pursue a common law claim for money had and received in the name of the personal representative or to pursue in equity an analogous action for money had and received in which it would be unnecessary to join the personal representative. In either case the mistake must be one of fact.

Thirdly, that in every case where a defendant institution had paid the money received by it into an account at its bankers, where it was mixed with other moneys of that defendant institution, the right to follow the money at common law ceased, because the means of identification failed: *Banque Belge Pour L'Etranger* v. *Hambrouck* [1921] 1 K. B. 321, and *Sinclair* v. *Brougham* [1914] A. C. 398, considered.

Fourthly, that in no case could the plaintiffs invoke the equitable doctrine of tracing and entering the banking account of a defendant institution, because, at the time of payment in, there was not that fiduciary relationship in existence which would have given the plaintiffs the right first to maintain that the defendant institution could not claim any interest in the mixed moneys in the account until the moneys received from the executors had been recouped to the deceased's estate and secondly to claim a charge on the whole of the mixed moneys to secure such recoupment: *In re Hallett's Estate* (1879) 13 Ch. D. 696, considered.

Fifthly, that, owing to the absence of any fiduciary relationship, the plaintiffs were not entitled to trace through an account and out, with a view to showing that an asset still held by a defendant institution had been acquired in whole or in part with the plaintiff's moneys.

Sixthly, that where a defendant institution had applied the money paid to it in the discharge of a secured debt, the property revested in the defendant institution free from the charge and the charge was not to be deemed to have been kept alive for the benefit of the plaintiffs.

Seventhly, that where the executors had imposed a condition as to how the money given was to be applied by a defendant institution, the acceptance of the condition did not enable that institution to set up the plea of purchaser for value. *Dillwyn* v. *Llewelyn* (1862) 4 De G. F. & J. 517, and *Taylor* v. *Blakelock* (1886) 32 Ch. D. 560, considered.

WITNESS ACTIONS.

These nineteen actions were heard together. The plaintiffs were the statutory next of kin of Caleb Diplock (hereinafter called "the testator") and the judicial trustee of his will.

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DIPLOCK, *In re.* DIPLOCK *v.* WINTLE (AND ASSOCIATED ACTIONS).

The following statement of facts is taken substantially from his Lordship's judgment.

By his will, dated November 3, 1919, the testator (by cl. 6 thereof) gave the residue of his property to his executors upon trust to sell or call in the same with power to postpone, and directed that out of the proceeds of such sale and calling in and out of his ready money his executors should pay his funeral and testamentary expenses and debts and the legacies bequeathed by his will and the duty on any legacies thereinbefore given free of duty and subject thereto should apply the residue " for such charitable institution or institutions or other " charitable or benevolent object or objects in England " as his acting executors or executor might, in their absolute discretion, select and to be paid to or for such institutions and objects, if more than one, in such proportions as his executors or executor might think proper ; and (by cl. 7 of his said will) the testator declared that the receipts of the treasurer or other proper officer for the time being of any hospital, home or other institution should be a sufficient discharge for any legacy bequeathed given or applied thereto. The testator died on March 23, 1936, without having revoked or altered his will, which was duly proved on May 16, 1936, by three of the executors therein named, the defendants Leslie Charles Wintle (who died on May 7, 1942), Lionel Edwin Charles Handson (who died on July 14, 1940) and Charles Thomas.

During the years 1936, 1937 and 1938, the executors applied out of the testator's estate the sum of 203,067*l.* 10*s.* or thereabouts by distributing this sum among a hundred and thirty-nine institutions. Each of these institutions was a charitable institution within the meaning of the phrase " legal charity." It will be convenient to refer collectively to those of the one hundred and thirty-nine institutions, which are defendants in this group of nineteen actions, as " the defendant institu-" tions." The distribution was made by cheques sent to the one hundred and thirty-nine institutions (including the defendant institutions) by the defendant Wintle, acting as solicitor for the executors, enclosed in letters each of which was in the following terms : " Dear Sir, Estate of Caleb Diplock, deceased. " Grants to London and other charities. The above-named " deceased by his will bequeathed his residuary estate for " distribution amongst such hospitals and institutions or other " charitable or benevolent objects in England as his executors " might in their absolute discretion select, and in such "proportion as they might think proper. The executors have "decided to allocate a grant of £ (blank) to (blank). We have "pleasure in enclosing you herewith a cheque for this amount. "We shall be obliged if you will sign and return us the enclosed "form of receipt. Faithfully yours."

The executors made all the payments to the defendant institutions by cheque. Those cheques were paid by the respective defendant institutions into their several banking accounts. In most cases the defendant institution paid the cheque into its general account, where the moneys so paid in became mixed with the other moneys of the defendant institution. In some cases the general account at the time of payment in was in credit, in others in debt. When the account was overdrawn some of the defendant institutions had charged their property to secure the overdraft. In others the bank in question had no security. In a few cases the money was paid into a special account.

In making the payments the executors in a few cases had given directions as to the application of the money. In one case they directed the money to be applied in discharging a debt owing by a hospital, in another in erecting a ward, in another in providing certain equipment. The defendant institutions had complied with the directions so given. In certain cases a plaque had been erected on the defendant institution's premises recording the gift. In another a ward had been named after the testator. In September, 1939, the executors were notified that the validity of the beneficial directions in cl. 6 of the testator's will were challenged by the plaintiff John Henry Diplock (who died on June 18, 1940) as one of the next of kin of the testator, on the ground that those directions were void for uncertainty, and that accordingly there was an intestacy as to his residuary estate.

On October 18, 1939, the executors' solicitors wrote to each of the defendant institutions a letter informing it that the validity of the payment to it was challenged, on the ground that the gift of the residue was void for uncertainty and calling upon each of the defendant institutions not to deal in any way with any part of the sum so paid to it, or with the income thereof, until such institution had heard further from the executors' solicitors, and asking to be informed whether the sum so paid to it and the income thereof was still in its hands.

On June 10, 1940, an originating summons was issued by the executors as plaintiffs against John Henry Diplock, the present plaintiff, the Chichester Diocesan Fund and Board of Finance (Incorporated), Raymond Henry Johnson and His Majesty's Attorney-General as defendants, raising the question of the validity of the trust of residue contained in cl. 6 of the testator's will.

This summons came before Farwell J. on July 18, 1940 (1), when he upheld the validity of the trust of residue. On appeal, the Court of Appeal, on January 15, 1941, reversed the decision of Farwell J., declaring that on the true construction of the testator's will the trust of residue contained in cl. 6 of the will was void for uncertainty, and that the residuary estate devolved as upon an intestacy (2).

By a certificate of the Master filed on March 6, 1942, in answer to an inquiry directed in this action, it was certified that the present plaintiffs were all included in the class of persons who, on the death of the testator, became beneficially entitled to any property of his as to which he died intestate.

On December 8, 1943, Clifford Grover Conolly was appointed judicial trustee of the testator's will, and an inquiry was directed as to who upon the death of the testator became beneficially entitled to any property of his as to which he died intestate and for what estate and interests and in what shares and proportions and whether any such persons were since dead and, if they died entitled to any vested share or interest, who were their personal representatives. No certificate had yet been made upon this inquiry.

On April 5, 1944, an order was made in this action approving the compromise of all claims by the present plaintiffs as three of the persons beneficially entitled to any property of the testator as to which he died intestate against the estates of the late defendants Wintle and Handson and against the defendant Thomas and the defendant Lilian Emily Handson (as personal representative of the late defendant Handson) arising under the administration of the estate of the testator, and approving the compromise of all claims by the present plaintiffs, as three of the persons beneficially entitled, as aforesaid against the defendants Thomas and Johnson and the estates of the late defendants Wintle and Handson in respect of a charge established by the executors out of land and money forming part of the testator's residuary estate, and it was ordered that the two compromises should be binding on all the persons beneficially entitled to any property of the testator as to which he died intestate other than the present plaintiffs, and that the judicial trustee of the testator's estate should carry such compromises into effect. It was further ordered that all proceedings in this action against the defendants Thomas Johnson and Lilian Emily Handson be stayed, except for the purpose of enforcing such terms. Finally, it was provided that the order should be without prejudice to any claim of the present plaintiffs against any of the societies or institutions to which was paid any sum forming part of the residuary estate of the testator.

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(1) [1940] Ch. 988.

(2) [1941] Ch. 253.

The defendants the Chichester Diocesan Fund and Board of Finance (Incorporated) appealed to the House of Lords against the Order of the Court of Appeal, and by a judgment of the House of Lords dated June 21, 1944, in *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson* (1), it was ordered and adjudged that the order of the Court of Appeal be affirmed.

The writ in the first action was issued on January 3, 1940, and the writs in the remaining eighteen actions were issued on July 28, 1945. In these actions the plaintiffs claimed declarations that the respective defendant institutions were liable to refund to the testator's estate the moneys respectively paid to them; alternatively, that the judicial trustee of the testator's will had a charge on the assets of the respective defendant institutions for the money so paid and the enforcement of such charge.

Pascoe Hayward K.C., *Fawell* and *J. L. Arnold* for the plaintiffs.

J. Monckton for the judicial trustee.

Neville Gray K.C. and *Geoffrey Cross* for the defendants the Middlesex Hospital.

Pennycuick for the defendants St. George's Hospital.

Jennings K.C. and *Wigglesworth* for the defendants, the Chichester Diocesan Fund and Board of Finance (Incorporated.)

Andrew Clark K.C. and *G. C. Dunbar* for the defendants, the London Hospital, the National Children's Orphanage, St. Thomas's Hospital, the Royal Sussex County Hospital, Dr. Barnardo's Homes and the National Institute for the Deaf.

G. C. Dunbar for the defendants, the Prince of Wales' Hospital, Plymouth, the Royal Alfred Merchant Seamen's Institution and the Leaf Homœopathic Hospital.

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(1) 1944 A. C. 341.

R. W. Goff for the defendants, the Royal Eye Hospital, Eastbourne, St. Mary Hall, Brighton (Incorporated), The Royal Sailors Girls' School and Home and the Royal United Kingdom Beneficent Association.

Jenkins K.C. and *J. H. Stamp* for the defendants, the Westminster Hospital, the Heritage Craft Schools, the Charing Cross Hospital; the Queen Alexandra Cottage Homes and Guy's Hospital.

Danckwerts for the Attorney-General.

The arguments of counsel sufficiently appear from his Lordship's judgment.

Cur. adv. vult.

March 11, 1947. The following judgment was read.

WYNN-PARRY J. The plaintiffs in each of these actions are among the persons entitled under the Administration of Estates Act, 1925, to share in such part of the estate of Caleb Diplock, deceased (to whom I will refer as "the testator") as to which he died intestate. These actions, nineteen in number, are brought by the plaintiffs as such next of kin to recover from such of the respective defendants as received them sums forming part of the residuary estate of the testator, paid to such defendants by the executors of the testator in circumstances which will be detailed later in this judgment. These actions are part of a larger number of actions, totalling in all a hundred and twenty, which raise claims substantially similar to the various claims raised in these actions; these nineteen actions are regarded as typical or representative of the claims which can be put forward by or on behalf of the next of kin of the testator in the circumstances detailed later; and upon the ultimate decisions in these actions will probably depend the fate of the claims in the other larger number of actions.

In these present actions, the plaintiffs and the defendants have put forward certain points by way of claim and defence, each of which raises a question of principle. All the relevant facts have been agreed between the plaintiffs and the respective defendants, a course which has had the result of saving considerable time and expense, and the whole of the facts were opened before me. In the course of the hearing, however, it was agreed that the convenient course to follow, and the course which I propose to follow in this judgment, is as follows: I shall state only those facts which, in my view, are necessary to raise the questions of principle which have been argued. I shall then state those questions of principle and decide them; I shall then adjourn this case to give the parties an opportunity to agree, so far as they can, the order which should be made in each action having regard to the special facts of that action, and my decision on the principle or principles applicable thereto; and finally, the case will be restored before me, when I can deal with any difficulty which may have arisen and direct what order is to be made in each case.

[His Lordship stated the facts set out above, and continued:] These are all the facts to which it is necessary to refer for the purpose of considering and adjudicating on the questions of principle raised by the plaintiffs and defendants respectively. The first three propositions put forward on behalf of the plaintiffs are propositions which, if well founded, are applicable in all the nineteen actions, subject to any special defences. I propose therefore, to deal first with these three points.

The first proposition on behalf of the plaintiffs was put forward by Mr. Pascoe Hayward on their behalf in these terms: If a person is entitled in equity to property, or to a sum of money, and if that property or sum is transferred or paid to another person who is not a purchaser for value without notice, the person entitled in equity has a personal claim in equity against the recipient for the value of the property transferred or the amount of the sum paid.

The same point was put forward by Mr. Fawell in these terms: Where A., without giving adequate consideration in equity, receives from B. money which belongs to C., B. is under an equitable obligation to account to C.

The second proposition on behalf of the plaintiffs was that each of the defendant institutions took with notice of the trust in favour of the plaintiffs.

The third proposition on behalf of the plaintiffs was that they have a personal claim at law against the defendant institutions for money had and received.

It will be convenient to deal with the second proposition first. This proposition was not argued. Counsel for the plaintiffs stated in his opening that he was constrained to admit that, in the present state of the authorities on the subject, it was not open to the plaintiffs to maintain this proposition in a court of first instance, though they desired to keep the point open in case the matter should go further. I must, therefore, proceed upon the basis that the letter written to each of the defendant institutions in the terms which I have already indicated did not operate to give them notice of the trust in favour of the plaintiffs.

I propose now to consider the plaintiffs' third proposition, because, in my view, the nature and extent of any personal claim which the plaintiffs may have in equity can only properly be appreciated after an examination of the nature and extent of the common law action for money had and received.

The action for money had and received is a common law action on the case founded upon an implied promise to pay which the law implies where A. has paid money to B. under a mistake of fact, the law setting up for the purpose of the claim the relationship of debtor and creditor between the parties.

It is now settled beyond dispute that the action is only available where the plaintiff has paid under a mistake of fact; it is not available where he has paid under a mistake of law. Reference for this proposition can be made to a multitude of authorities, but it will be sufficient to refer to the following cases. In *Kelly* v. *Solari* (1), Parke B., said: "I think that "where money is paid to another under the influence of a "mistake, that is, upon the supposition that a specific fact "is true, which would entitle the other to the money, but which "fact is untrue, and the money would not have been paid if it "had been known to the payer that the fact was untrue, an "action will lie to recover it back, and it is against conscience to "retain it; though a demand may be necessary in those "cases in which the party receiving may have been ignorant "of the mistake. The position that a person so paying is "precluded from recovering by laches, in not availing himself "of the means of knowledge in his power, seems, from the "cases cited, to have been founded on the dictum of Bayley J., "in the case of *Milnes* v. *Duncan* (2); and with all respect to "that authority, I do not think it can be sustained in point of "law."

In the same case, Rolfe B., said (3): "With respect to the "argument, that money cannot be recovered back except where "it is unconscientious to retain it, it seems to me, that wherever "it is paid under a mistake of fact, and the party would not "have paid it if the fact had been known to him, it cannot be "otherwise than unconscientious to retain it."

In *Maskell* v. *Horner* (4) Rowlatt J. said: "The plaintiff

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(1) (1841) 9 M. & W. 54, 58.

(2) (1827) 6 B. & C. 671.

(3) 9 M. & W. 54, 59.

(4) [1915] 3 K. B. 106, 108.

" claims to recover these sums as paid under a mistake of fact, " or, alternatively, as paid not voluntarily, but to prevent his " goods being seized and under protest. I think it is necessary " to state two principles of law to which he appeals and then " to see if the circumstances bring him within either. To " recover under the first principle there must be a mistake of " fact and a fact going to the supposed liability. That is laid " down in *Kelly* v. *Solari* (1) and *Aiken* v. *Short* (2). An action " on this ground, therefore, can only be brought by one who " pays, believing in his liability, because by mistake he believes " a fact upon which his liability depends."

In the Court of Appeal, Lord Reading L.C.J., said (3): " I will deal first with the claim under a mistake of fact. It is " an essential condition of the plaintiff's right to recover under " this head that he should establish that he paid the money in " the belief that a fact was true which was untrue."

The principle appears clearly from the judgments of the Court of Appeal in *Holt* v. *Markham* (4), and it is stated in terms by Atkinson J. in *Anglo-Scottish Beet Sugar Corporation, Ld.* v. *Spalding U.D.C.* (5): " It is, of course, common ground " that mistake of law does not entitle a person paying to " recover money; and a mistake in the construction of a " contract is treated as mistake of law . . . ."

It was argued on behalf of the plaintiffs that all the cases where mistake of law has been held to preclude recovery were cases where there was a contractual nexus between the parties. It was, it was said, because of that nexus that the recipient of money was held liable to pay. It was, however, admitted that where two parties are in legal relationship arising from contract, it is impossible to deny that the construction of any document defining their relationship must be a matter of law. It was then urged that here there was no nexus between the next of kin and the defendant institutions, or between the executors and the defendant institutions.

It appears to me, however, that in view of the circumstances already referred to—that the action for money had and received is based on an implied promise to repay, and that for the purpose of the claim the relationship of debtor and creditor subsists between the parties—this argument necessarily breaks down, and that it is immaterial whether or not there was a contractual nexus in fact. The rule that the mistake upon which an action for money had and received must be based must be a mistake of fact is, in my view, of completely general application, and in no way depends upon the pre-existence in fact of a contract, written or oral, between the parties. The plaintiff in any action for money had and received must, as an essential condition of success, be able to show that he paid the money claimed under a mistake of fact. It was indeed pleaded that the mistake in this case was a mistake of fact.

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(1) 9 M. & W. 54.
(2) (1856) 1 H. & N. 210.
(3) [1915] 3 K. B. 106, 117.
(4) [1923] 1 K. B. 504.
(5) [1937] 2 K. B. 607, 615.

Paragraph 31 of the statement of claim reads as follows: "The several sums so paid to the defendant institutions as "aforesaid were paid by the defendant executors as a result "of a mistake of fact, that it to say a mistake, as to the class "of beneficiaries interested in the testator's residuary estate." It was argued that the mistake was a mistake as to the persons entitled in equity to the fund. It was said that all mistakes of that nature—that is, all mistakes of title—are fundamentally mistakes of fact, though such a mistake may arise from a mistake of law, and *Anglo-Scottish Beet Sugar Corporation, Ld.* v. *Spalding U.D.C.* (1), was relied on in support of this argument.

Thus, the crucial question arises, what was the nature of the mistake in this case. In my judgment it was a mistake as to part of the general law of England; but, if I am wrong in that view, then, in my judgment, it was a mistake as to the construction of the testator's will.

It may be that in certain cases of payment of money there is involved a mistake of fact and a mistake of law, or there may be a mistake partly of fact and partly of law. The vital consideration in each case is what was the mistake which occasioned the payment; *Holt* v. *Markham* (2), and *Anglo-Scottish Sugar Beet Corporation, Ld.* v. *Spalding U.D.C.* (1).

The mistake which was actually made here is concisely stated in para. 5 of the affidavit of the late defendant Wintle, sworn by him in support of the originating summons taken out, as I have already stated, to test the validity of the residuary gift. Paragraph 5, so far as material, reads as follows: "In the "belief that the trust contained in cl. 6 of the testator's will "with regard to the disposition of the testator's residuary "estate was a valid charitable trust my co-plaintiffs and I paid "to the societies and institutions . . . . the several sums" in question.

In my view, that means that the mistake upon which the

(1) [1937] 2 K. B. 607, 615.

(2) [1923] 1 K. B. 504.

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executors acted was the mistaken belief that a gift for charitable or benevolent purposes was a valid charitable gift in English law, whereas in truth it is a gift which in English law is void for uncertainty. It was a mistake as to the complicated technical requisites for the creation of a valid charitable trust. The term "charitable" is a term of art ascertainable by reference to the preamble of the Statute of Elizabeth, to the objects there enumerated and all others which "by analogies are deemed "within its spirit and intendment"—see per Lord Simonds in *Chichester Diocesan Fund and Board of Finance* (*Incorporated*) v. *Simpson* (1)—the case in which this residuary bequest was finally pronounced to be invalid. It is very different from the word "charitable" as used in the ordinary sense of the word as will be seen from *In re Macduff* (2). Stirling J., as he then was, said (3): "The question then arises whether a "bequest for 'charitable or philanthropic purposes' is valid "according to the law of England. In order that it may be "valid, the purposes as defined by the testator's will must be "'charitable' in the technical sense in which that word is "used in this court."

In *Chichester Diocesan Fund and Board of Finance* (*Incorporated*) v. *Simpson* (4), Lord Simonds said: "My Lords, of "those three words your Lordships will have no doubt what the "first, 'charitable,' means. It is a term of art with a technical "meaning and that is the meaning which the testator must be "assumed to have intended. If it were not so, if in this will "'charitable' were to be given, not its legal, but some popular, "meaning, it would not be possible to establish the validity "of the bequest. The last of the three words 'benevolent' "is not a term of art. In its ordinary meaning it has a range "in some respects far less wide than legal charity, in others "somewhat wider."

If, however, I am wrong in that view, then in my judgment the essential mistake was one of construction of the will. Upon no view can I see that any mistake of fact was involved at all. At the least it was a mistake as to the construction of the will as a whole, and the application to it of the decided cases. The only fact which the executors took into consideration was the actual wording of the will. As to this, there was no dispute, and therefore there could be no mistake of fact.

Now, it is plain that an action for money had and received

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(1) [1944] A. C. 341, 371.

(2) [1896] 2 Ch. 451.

(3) Ibid. 455.

(4) [1944] A. C. 341, 368.

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Diplock, *In re.* Diplock *v.* Wintle (and Associated Actions).

cannot be founded on a mistake of law. It is equally clear that such an action cannot be founded upon a mistake of construction; see per Atkinson J. in *Anglo-Scottish Beet Sugar Corporation, Ld.* v. *Spalding U.D.C.* (1). See also *Rogers* v. *Ingham* (2), where it is assumed that the construction of a will is a question of law; and *In re Hatch* (3), where the construction of a deed is treated as a question of law.

Against this weight of authority is urged the dictum of Lord Westbury in *Cooper* v. *Phibbs* (4), where he said: "The "result, therefore, is, that at the time of the agreement for the "lease which it is the object of this petition to set aside, "the parties dealt with one another under a mutual mistake "as to their respective rights. The petitioner did not suppose "that he was, what in truth he was, tenant for life of the fishery "The other parties acted upon the impression given to them "by their father, that he (their father) was the owner of the "fishery, and that the fishery had descended to them. In such "a state of things there can be no doubt of the rule of a Court "of equity with regard to the dealing with that agreement. "It is said 'ignorantia juris haud excusat'; but in that maxim "the word 'jus' is used in the sense of denoting general law, "the ordinary law of the country. But when the word 'jus' "is used in the sense of denoting a private right, that maxim "has no application. Private right of ownership is a matter "of fact; it may be the result also of matter of law; but if "parties contract under a mutual mistake and misapprehension "as to their relative and respective rights, the result is, that that "agreement is liable to be set aside as having proceeded upon "a common mistake."

This dictum has given rise to much subsequent discussion and also to criticism, a recent example being the remarks of Lord Atkin in *Bell* v. *Lever Brothers, Ld.* (5), where he said: "Corresponding to mistake as to the existence of the subject-"matter is mistake as to title in cases where, unknown to the "parties, the buyer is already the owner of that which the seller "purports to sell to him. The parties intended to effectuate "a transfer of ownership: such a transfer is impossible: "the situation is naturali ratione inutilis. This is the case of "*Cooper* v. *Phibbs* (4) . . . . To such a case Lord Westbury "applied the principle that if parties contract under a mutual

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(1) [1937] 2 K. B. 607, 615.
(2) (1876) 3 Ch. D. 351.
(3) [1919] 1 Ch. 351.
(4) (1867) L. R. 2 H. L. 149, 170.
(5) [1932] A. C. 161, 218.

" mistake and misapprehension as to their relative and respective rights the result is that the agreement is liable to be set " aside as having proceeded upon a common mistake. Applied " to the context the statement is only subject to the criticism " that the agreement would appear to be void rather than " voidable. Applied to mistake as to rights generally it would " appear to be too wide. Even where the vendor has no title, " though both parties think he has, the correct view would " appear to be that there is a contract, but that the vendor " has either committed a breach of a stipulation as to title, " or is not able to perform his contract. The contract is " unenforceable by him but is not void."

I think the true view is that the dictum must be read in its proper context, that is, in regard to an equitable claim for equitable relief, for example, setting aside a contract, as part of which relief repayment of money may be directed, in which case no difficulty arises, because in certain cases where equitable relief is sought, a mistake of law is not necessarily fatal. In the light of the modern authorities, however, it cannot be prayed in aid for the proposition that a mistake of construction is a mistake of private rights, and is therefore a mistake of fact which will found a claim for the repayment of money; and, in my respectful view, Lord Westbury never intended to say any such thing.

For these reasons, therefore, the plaintiffs' claim for the return of the money paid to the defendant institutions, in so far as it is based on a claim for money had and received, fails.

I now turn to the first proposition put forward on behalf of the plaintiffs to which I have already referred. I must proceed to examine this proposition upon the basis that the recipient, postulated by Mr. Pascoe Hayward and Mr. Fawell, receives without such notice as would make him an express trustee. The plaintiffs' counsel were unable to cite any reported case or to point to any accepted text book on equity in which the proposition as enunciated, or substantially as enunciated by them, was stated. In his reply, Mr. Pascoe Hayward disclaimed that he was putting forward a wide proposition. He disclaimed any attempt to put forward a proposition based merely upon what must be regarded as ex aequo et bono, or what has been conveniently referred to as " justice between " man and man." He was constrained to accept (and, in my view, rightly) that the existence of any general head of equity based on those unsatisfactorily vague principles has been exploded. In this regard I need only refer first to the judgment of Hamilton L.J. (as he then was) in *Baylis* v. *Bishop of London* (1), where, having quoted from the judgment of James L.J. in *Rogers* v. *Ingham* (2), he said: "In effect, therefore, both the equitable and the legal considerations applicable "to the recovery of money paid under a mistake of fact have "been crystallized in the reported common law cases. The "question is whether it is conscientious for the defendant to "keep the money, not whether it is fair for the plaintiff to ask "to have it back. To ask what course would be ex aequo et "bono to both sides never was a very precise guide, and, as a "working rule, it has long since been buried in *Standish* v. "*Ross* (3) and *Kelly* v. *Solari* (4). Whatever may have been "the case a hundred and forty-six years ago, we are not now "free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as "'between man and man'." These remarks, in my judgment, are applicable to equity in general, and not merely to those equitable considerations imported by the common law courts into the action for money had and received, and upon which it has been developed. For myself, I am unable to agree that the proposition put forward by the plaintiffs is a narrow, or comparatively narrow, proposition. It appears to me to be of wide import, but that, of course, is not a circumstance which of itself precludes its existence. The plaintiffs maintain that it is to be extracted from a perusal of the authorities, not in any one authority, but as the result of the cumulative effect of a number of the authorities.

I proceed, therefore, to a consideration of the authorities upon which the plaintiffs rely. In considering these cases it is, I think, necessary to bear in mind, for reasons which will appear later, that it is an essential part of the plaintiffs' proposition that mistake, whether of law or fact, is an irrelevant consideration They postulated the example of a distribution by executors of a will similar in terms to the will under consideration in this case where the executors, being under no misapprehension as to the invalidity of their testator's directions, yet insist in making the distribution among bodies similar in character to the defendant institutions. This example was characterized by counsel for the defendants as highly improbable. Be it so; nevertheless the plaintiffs' counsel clearly had to put their case as high as this.

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(1) [1913] 1 Ch. 127, 140.
(2) 3 Ch. D. 351.
(3) (1849) 3 Ex. 527.
(4) 9 M. & W. 54.

The first five cases relied on were *Gillespie* v. *Alexander* (1); *Greig* v. *Somerville* (2); *David* v. *Frowd* (3); *Sawyer* v. *Birchmore* (4); and *Thomas* v. *Griffith* (5). In each of these cases there was, or had been, an administration action; a distribution partial or complete, had been directed by the court; and the creditor or beneficiary who claimed payment was allowed to do so in the administration action where it was still on foot, or, in separate proceedings, where the proceedings in the administration action had been completed.

An analysis of these cases discloses two points of significance. In the first place, the distribution had in each case been made pursuant to an order of the court in an administration action, and, in the second place, the mistake, pursuant to which in each case the money had been paid, was a mistake of fact. As regards the first point, the basis upon which the distribution was ordered is explained first by a reference to the judgment of Sir John Leach M.R., in *David* v. *Frowd* (6), where he says:

" It is argued, also that the case is extremely hard upon the " party who is to refund, for that he has full right to consider " the money as his own, and may have spent it, and that it " would be against the policy of the law to recall money which a " party has obtained by the effect of a judgment upon a liti- " gated title. There is here no judgment upon a litigated title; " the party, who now claims by a paramount title, was absent " from the court, and all that is adjudged is, that upon an " inquiry, in its nature imperfect, parties are found to have a " prima facie claim, subject to be defeated upon better " information. The apparent title under the Master's report " is in its nature defeasible. A party claiming under such " circumstances has no great reason to complain that he is " called upon to replace what he has received against his right; " complaints of hardship come with little force from the party " who seeks to support a wrong."

Secondly, reference may be made to the exposition of the practice of the old Court of Chancery, and now of the Chancery Division, in administration actions to be found in the opinion of Lord Davey in *Harrison* v. *Kirk* (7).

As regards the second point, namely, that the mistake in each case was a mistake of fact, that necessarily follows from an

(1) (1826) 3 Russ. 130.
(2) (1830) 1 Russ. & My. 338.
(3) (1833) 1 My. & K. 200.
(4) (1836) 1 Keen 391.
(5) (1860) 2 Giff. 504.
(6) 1 Myl. & K. 200, 211.
(7) [1904] A. C. 1, 5.

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examination of the facts; it was in each case a question of whether a person was a creditor, or whether a person was one of the next of kin of the deceased, in either case clearly a question of fact. In my view, therefore, these cases, properly considered, do not support the wide proposition for which the plaintiffs contend.

The next case relied on was the case of *Harris* v. *Harris* (1). Having regard, however, to the exhaustive and searching examination and criticism to which this case was subjected by Warrington J. (as he then was) in *In re Robinson* (2), Mr. Pascoe Hayward was constrained to admit that he could not place much reliance on this case.

The plaintiffs relied strongly on passages from the judgments of Mellish L.J. and Baggallay J.A. in *Rogers* v. *Ingham* (3). That was a case in which:

"An executor, acting on the advice of counsel on the "construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees being "dissatisfied took the opinion of counsel, which agreed with "the former opinion. The executor then divided and paid over "the fund in accordance with the opinions. Two years afterwards the dissatisfied legatee filed a bill against the executor "and the other legatee, alleging that the will had been wrongly "construed, and claiming repayment from the other legatee"; and it was held that the suit could not be maintained. Mellish L.J., said (4): "There is no doubt as to the rule of law "that money paid with a full knowledge of all the facts, "although it may be under a mistake of law on the part of both "parties, cannot be recovered back; and I think it is equally "clear that, as a general rule, the court of equity did not, "in such cases, interfere with the courts of law . . . . "I think there is no doubt that the rule at law is in itself an "equitable and just rule which is not interfered with by courts "of equity; but, on the other hand, I think that, no doubt, "as was said by Turner L.J.: 'This court has power (as I feel "'no doubt that it has) to relieve against mistakes in law as "'well as against mistakes in fact'; that is to say, if there is "any equitable ground which makes it, under the particular "facts of the case, inequitable that the party who received the "money should retain it." It is to be observed that the learned lord justice, having stated the established rule of law

(1) (1861) 29 Beav. 110.

(2) [1911] 1 Ch. 502.

(3) 3 Ch. D. 351.

(4) Ibid. 357.

that money paid under a mutual mistake of law cannot be recovered back, said that "as a general rule, the Court of Equity "did not, in such cases, interfere with the courts of law." It was only after making this observation that he referred to the power of the court of equity, in granting equitable relief, to order repayment of money where the mistake in question was a mistake of law. The passage in question is no authority for the proposition that there is a general rule of equity that a court of equity will entertain a mere money claim, where the payment was made under a mistake of law.

Baggallay J. A. said (1): "I am of the same opinion, and "I merely wish to add that while I give a general assent to the "passage in the judgment of Lord Brougham (in *Clifton* v. "*Cockburn*) (2) which has been referred to in the course of the "argument, in which he expressed himself to the effect that "cases might arise in which it would be the duty of the court "to relieve against an error of law, I do not think that the "present is a proper case for the application of such a "principle." This is a most guarded statement not referring to any specific case in which equity would relieve upon a mistake of law, and couched in the subjunctive mood. The plaintiffs can gain little or no support from this passage.

But their difficulty in relying on this case appears to me to be manifestly increased when reference is made to what James L.J. said (3): "I have no doubt that there are some cases which "have been relied on, in which this court has not adhered "strictly to the rule that a mistake in law is not always in-"capable of being remedied in this court; but relief has never "been given in the case of a simple money demand by one "person against another, there being between those two "persons no fiduciary relation whatever, and no equity to "supervene by reason of the conduct of either of the parties." Those words seem to me to apply with full force to the claim in this case which I am now considering.

The plaintiffs then relied on *In re Robinson* (4). They admit, as they must, that it is not an express decision in their favour, but they point out that the decision turned on the application of the Statutes of Limitation, and contend that by implication the case recognizes a special principle of equity relating to the recovery of a trust fund by one cestui que trust from another, where it has been wrongly dealt with by the trustee. The

(1) 3 Ch. D. 358.
(2) (1834) 3 Myl. & K. 99.
(3) 3 Ch. D. 355.
(4) [1911] 1 Ch. 502.

headnote in this case, which, in my view, is amply borne out by the judgment, is as follows (1): " An action brought in the " Chancery Division by one cestui que trust against another " cestui que trust to recover money wrongly paid by the trustee " to the latter under a common mistake of fact is in the nature " of a common law action for money had and received, and the " court, acting on the analogy of the Limitation Act, 1623, " will hold the claim to be barred after the lapse of six years. " The case would be different if the claim were made in an " action in which the court was administering the trust estate. " There, if there were assets to which the over-paid cestui que " trust was entitled, the court would adjust the accounts as " between the parties entitled, and lapse of time would be no " bar."

So that at first sight the case does not appear very helpful to the plaintiffs. Warrington J. (as he then) was pointed out that the claim was a mere money demand (2). Then, having adverted to the fact that the claim was not by the person who paid it, but by the person whose money was paid away, he treated the claim as being either a strict claim in law for money had and received, or as an analogous claim in equity to which, therefore, equity by analogy would apply the Statutes of Limitation. He examined the contention of the plaintiff that in regard to a mere money demand there was a claim in equity, other than a claim analogous to the common law action of money had and received, and, in my judgment, so far from having, by implication, admitted the existence of such a claim in equity, the learned judge, when his judgment is considered as a whole, negatived it.

The plaintiffs also relied on *In re Mason* (3). The facts in this case were that: " A lunatic, at the date of her death in 1798, " was entitled to certain funds in court representing the " residuary estate of her father. In 1794, the Master had " reported that the lunatic had no heir at law or next of kin. " In 1798 and 1801 the Crown made ex gratia grants of these " funds to certain persons and obtained an indemnity in respect " of these grants. In 1926, a petition was presented by persons " claiming to be the next of kin of the lunatic for the payment " to them of the whole of her personal estate." The case was decided against the suppliants upon the ground that the claim was barred by the Limitation Act, 1623.

Mr. Pascoe Hayward, however, contended that, by implication, the case shows that the equitable principle for which he contends exists. His argument is that if this principle did not exist, then logically that point should have been taken, and would have been taken, as the first point on behalf of the Crown. I cannot accept this reasoning either as conclusive, or indeed as satisfactory. In the first place, no such proposition as that for which the plantiffs contend was put forward by counsel for the suppliants. Their case, so far as relevant, proceeded upon the basis that all parties knew the property was subject to a trust, and that, where such knowledge exists, the statute can have no application. This contention was countered on behalf of the Crown by the argument that the claim was like that in *In re Robinson* (1), that is, an action for money paid under a mistake of fact, and was therefore barred in six years.

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(1) [1911] 1 Ch. 502,

(2) Ibid. 502, 507, 508.

(3) [1928] Ch. 385.

Romer J. (as he then was) having analysed the claim said (2): " It is, in other words, a claim by a cestui que trust to recover " from a third party money which his trustee has by mistake " paid to that third party. Such a claim is one for money had " and received. Now it was pointed out by Warrington J. " in *In re Robinson* (1), to which I must refer presently, that it " may be a matter of some doubt whether, in strictness, the " cestui que trust in such a case could maintain an action against " the third party for money had and received, though he could " at all events maintain a suit in equity for it, making the " trustee a party. But in such a suit the cestqui que trust " would have no better right than the trustee would have in an " action brought by himself, and if the claim of the trustee " would be barred in an action at law by any Statute of Limi" tations, the claim of the cestui que trust, so far as it was one " for money had and received, would be equally barred." It is plain, therefore, that Romer J. treated the claim by the suppliants as a money demand maintainable only by an action for money had and received at common law, or by an analogous claim in equity. I cannot, therefore, regard this case as supporting the plaintiffs' third proposition.

I now turn to the case of *In re Rivers* (3), which was strongly relied on by the plaintiffs. They prayed this case in aid as showing, first, that the earlier five cases to which I have referred—*Gillespie* v. *Alexander* (4); *Greig* v. *Somerville* (5); *David* v. *Frowd* (6); *Sawyer* v. *Birchmore* (7); and *Thomas*

(1) [1911] 1 Ch. 502.
(2) [1928] Ch. 385, 391.
(3) [1920] 1 Ch. 320.
(4) 3 Russ. 130.
(5) 1 Russ. & My. 338.
(6) 1 Myl. & K. 200.
(7) 1 Keen 391.

v. *Griffiths* (1)—are all still good law, a proposition which no one doubts; and, secondly, to show that this case of *In re Rivers* (2) affords an example (indeed, so far as the industry of the plaintiffs' counsel could show, and that industry was manifest, the only example) in modern times of the application of the principle of equity for which the plaintiffs contend, and which they say is to be extracted from the cases. This case, they say, is clear authority for the proposition which they advance, that it is a case in which repayment of money was ordered, although it had not been paid and received under a mistake of fact.

In my judgment, the case, when examined, does not help the plaintiffs. It is, I think, a simple example of a person receiving a payment otherwise than in due course of administration and being compelled to submit to an adjustment. It was for that reason, I think, that counsel for the defendants in that case was constrained to admit that he could not rely on the Statutes of Limitation. So regarded, the case falls within, and is but a further illustration of the principle emerging from, the five cases to which I have referred. I would add that, in so far as it may be necessary to do so, I take the view that in this case a mistake of fact was involved.

The defendants, for reasons which I think sufficiently appear, from my analysis of the cases in question, in seeking to deny the existence of any such equity as that for which the plaintiffs contend, relied on the cases of *Rogers* v. *Ingham* (3), *In re Mason* (4), and *In re Robinson* (5). In addition, they relied on a number of cases to which I must refer.

The first is the case of *Hilliard* v. *Fulford* (6). The relevant part of the headnote in the case reads as follows: " Where, after " executors had made a partial distribution of the residue, " an administration action was instituted by the residuary " legatees who had not received their shares, and it then turned " out that the executors had made two mistakes, first, in " making their distribution upon an erroneous assumption " that the residue was divisible among five persons instead of " six; and, secondly, in expending part of the general personal " estate in repairs of property specifically devised: *Held*, " that the overpaid residuary legatees could not be made to " refund, that the executors must stand in the same position

(1) 2 Giff. 504.
(2) [1920] 1 Ch. 320.
(3) 3 Ch. D. 351.
(4) [1928] Ch. 385.
(5) [1911] 1 Ch. 502.
(6) (1876) 4 Ch. D. 389.

" as if no distribution had taken place, and that the costs of the " action should be paid as out of the entire residuary estate, " so as to charge the executors with the share of costs attributable to each of the distributed shares ; and then that the " executors should pay the balance necessary to make up to the " unpaid legatees one-sixth of the residue each."

Sir George Jessel M.R., said (1) : " The suit now comes on for " hearing on further consideration ; and it seems that, after " paying all the costs of the suit, the result will be that the " executors will have paid probably more than their shares to " the adult residuary legatees ; that is, if the estate were now " to be distributed, they would not get as much as 750*l.* each. " The question is, who is to make good the difference ? That is " really what it comes to."

It is important to bear that statement in mind in view of as later observation in the judgment. The Master of the Rolls said (2) : " But where, as in this case, the accounts are " substantially incorrect, and where the executors have made " two most serious mistakes, one in choosing to take upon " themselves the office of the court in construing an obscure " will, and construing it wrongly, and secondly, making so " serious an error as laying out as much as 1,095*l.* in repairing a " freehold which did not belong to their cestuis que trust, " I think the executors cannot be allowed to say that the " distribution is a proper distribution, and that it ought to " avail them when the accounts come to be subsequently " taken. I think they must stand in the same position as if " there had been no distribution at all. Therefore I think the " right order is that the whole costs of the administration suit " should be taken out of the estate as if they had never divided " it, so that the plaintiff and the infant defendant will be entitled to exactly the same shares out of the residuary estate " as if no distribution had taken place and the other residuary " legatees had been made defendants. Of course you cannot " make those other residuary legatees pay back anything. There " is no pretence for saying that they can be compelled to come " in and contribute. Therefore the difference, which I think " cannot be very large, will in substance have to be made good " by the executors who wrongly distributed the estate : they " who have made the error will have to pay for it."

Now, it was strongly contended on behalf of the plaintiffs that the words which I have read : " Of course you cannot make

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(1) 4 Ch. D. 392. (2) Ibid. 393.

"those other residuary legatees pay back anything. There is "no pretence for saying that they can be compelled to come in "and contribute" (1), must be taken to relate only to a contribution to costs, and that they cannot be regarded as indicating that Sir George Jessel M.R., entertained the view that, had it not been merely a deficiency as regards costs, contribution could not have been claimed from the other residuary legatees. I do not share this view. It is true that in the result the matter was reduced to a question of contributing towards the costs, but, in my opinion, the whole of the reasoning in the judgment shows that the Master of the Rolls considered that no repayment for costs or otherwise could be claimed from the other residuary legatees. When he says (2): "The "question is, who is to make good the difference? That is "really what it comes to," he is referring to a deficiency in shares, and not to costs. Again, when he says (1): "There is "no pretence for saying that they can be compelled to come in "and contribute," he does so because of what he has said in the preceding sentence: "Of course you cannot make those "other residuary legatees pay back anything," a statement of general application, and certainly not limited to a contribution to costs.

In my view, therefore, this case tends strongly to negative the existence of the equitable principle for which the plaintiffs contend, and it is of considerable importance in this matter because, as I interpret it, it is authority for the proposition that a mistake of construction in regard to a will is a mistake of law, and that a payment by executors to a legatee under such a mistake of law will be a bar to a personal claim by other persons entitled under the will, who have either been under-paid or not been paid, to recover from the recipients.

The second case is that of *In re Hatch* (3). In that case the court had to consider a deed made in 1885 under which a husband covenanted to pay to his wife 200*l.* per annum during her life. The husband died in 1907, having by his will bequeathed his residuary estate to his executors and trustees, upon certain trusts in favour of his four sons, one of whom subsequently died, having bequeathed his one-fourth share to the wife absolutely. The husband during his life-time, and his executors and trustees after his death, had paid the wife's annuity in full without deducting income tax. It was held that

(1) 4 Ch. D. 394.

(2) Ibid. 392.

(3) [1919] 1 Ch. 351.

on the true construction of the deed, the wife's annuity was payable subject to, and not free from, income tax, and that past over-payments in respect of income tax having been made under a mistake of law were not recoverable as a debt from the wife, and could not be deducted either from future payments of the annuity or from the wife's share in the residuary estate of the husband. Sargant J. (as he then was), said (1): "It is "said that the annuitant having received out of the residuary "estate of the testator a larger payment than she was entitled "to as a creditor, is not entitled to receive any further part of "that estate until that estate has been recouped the amount "of such overpayments out of the share to which the annuitant "has become beneficially entitled. That would no doubt be so "if the overpayments had been made under a mistake of fact, "since in that case the estate would be a creditor of the "annuitant; but here the estate is not a creditor of the "annuitant because the mistake is one of law, and what is "sought is to set off against the beneficial interest of the "annuitant in the estate something short of a debt—something "which never was a debt owing by her, and cannot therefore "be made available for the purpose of reducing the amount "payable to her in respect of her beneficial interest. Assume "for a moment that by a mistake of law the annuitant as a "creditor had been paid too little so that the residuary legatees "had received too much, would it be open to the annuitant to "stop the distribution of the estate until the sums by which the "residuary legatees had been overpaid had been deducted? "To ask that question is, in my opinion, to answer it. The "fact is that the payment having been made under a mistake "of law the parties are left as they are without any resultant "rights."

The basis of this decision is that in the case of payment of money under a mistake of fact, recoupment could have been ordered, because in that case the estate would have been a creditor of the annuitant; but that the mistake being one of construction, and therefore, one of law, the relationship of debtor and creditor between the annuitant and the estate could not be implied, and therefore, no debt could be implied in respect of which recoupment could be ordered. The claim was treated as one which, if it were to achieve success, must fulfil the conditions required for the successful prosecution of a claim for money had and received at common law, or the analogous

(1) [1919] 1 Ch. 351, 356.

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claim entertained in equity, an essential condition of which was, of course, that the money in respect of which recoupment was sought should have been paid under a mistake of fact. Sargant J. rejected the contention by Mr. Stafford Crossman (as he then was) (1), that there was an equity, arising out of the circumstances existing at the date of the testator's death, entitling the trustees to recoup to the estate the amount of the over-payments—though made under a mistake of law, and not constituting a legal debt—out of the share to which the annuitant became beneficially entitled.

This case, therefore, strongly militates against the existence of the principle for which the plaintiffs contend, unless there be any foundation for their submission that, as regards the quality of the mistake, cases of misconstruction of deeds and contracts are to be distinguished from cases of misconstruction of wills in the consideration of claims based on more money demands. I am unable to see any distinction in principle, and, in my view, the weight of authority is directly against the existence of any such distinction. I need only refer again to *Hilliard* v. *Fulford* (2), and *Rogers* v. *Ingham* (3).

The third case is *In re Blake* (4). The facts, as they appear from the headnote, were as follows: "The suppliant on a "petition of right claimed to be entitled to the estate of an "intestate who died on September 23, 1876. The petition "stated that the suppliant was the legal personal representative "of the grandchild of a paternal aunt of the intestate who died "in 1886; that by an order dated June 23, 1883, it was declared "that Queen Victoria was in right of her Royal Prerogative "entitled to the intestate's personal estate, that it was ordered "that the residue be paid by the Treasury Solicitor to such "persons as Her Majesty or the Lords Commissioners of the "Treasury should direct; that, pursuant to that order, the "residue was transferred to the Paymaster-General; and that, "at the date of the petition, the money, stocks and funds in "question formed part of the Consolidated Fund and were held "in trust for the intestate's next of kin. The petition submitted "that an inquiry ought to be directed to ascertain who were the "persons entitled to the estate and to what extent, and that "the amount should be paid over to them. The Crown by "demurrer pleaded that the claim was barred by the Limitation "Act, 1623, and that the petition was bad in substance and in

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(1) [1919] 1 Ch. 351, 355.

(2) 4 Ch. D. 389.

(3) 3 Ch. D. 351.

(4) [1932] 1 Ch. 54.

" law on the ground that, on the facts therein alleged, no part " of the money, stocks and funds constituting or representing " the personal estate of the intestate, or forming part of the " Consolidated Fund, was held in trust for the next of kin: " *Held,* that the Crown succeeded on the point taken by the " demurrer and that the petition must be dismissed."

The suppliant's case, as appears from the argument of Mr. Vaisey (as he then was) (1), was rested upon a right to follow the residue into the Consolidated Fund (and for the purpose of considering the extent of the doctrine of following assets I shall have occasion to return to this case later) which, if established, would, according to the contention on behalf of the suppliant, have avoided the application of the Statutes of Limitation. Maugham J. (as he then was), having discussed the nature of the Consolidated Fund (2), disposed of the suppliant's claim to follow the residue into that fund in these words: " In these " circumstances it seems to be clear that (for the present " purpose) the petition ought to be treated in the same way as " an equitable claim brought by the next of kin of an intestate " against a subject who has wrongly received part of the intestate's estate, pursuant to an order of the court and without " any notice of the plaintiff's title."

On the previous page there is a passage, which throws much light on the question which I am considering. Referring to the Intestates Act, 1884, Maugham J. said: " Having regard to the " plain distinction between the language used in s. 2 and that " used in s. 3, it must, I think, be evident that where the Crown " is being sued the actions contemplated by the latter section " are actions against a subject to whom the administrator has " wrongly paid part of the personal estate of the intestate. " Such an action might have different forms. An action in the " Chancery Division brought by the next of kin against a person " to whom the administrator had wrongly paid part of the " personal estate of the intestate under a mistake of fact (not " joining the administrator and seeking administration) would " be in the nature of a common law action for money had and " received, and the court, acting on the analogy of the Statute " of James I. (21 Jac. 1, c. 16) would hold the claim to be barred " after the lapse of six years from the date of payment: see " *In re Robinson* (3), where the law is elaborately explained by " Warrington J., and *In re Mason* (4). A common law action

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(1) [1935] 1 Ch. 54, 57.
(2) Ibid. 61.
(3) [1911] 1 Ch. 502.
(4) [1928] Ch. 385.

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"of the same character, assuming that such an action would lie, "would also be barred by the same statute after the expiration "of six years from the date of payment; *Baker* v. *Courage* "*& Co.* (1). On the other hand there is no doubt that in a "proper case the next of kin might bring an action in the "Chancery Division to follow the trust property if the defen-"dant to whom the administrator had paid it were still in "possession of it."

Now, it is quite true, as was emphasized by Mr. Pascoe Hayward, that the only question decided was that the suppliant's claim was barred by lapse of time; but I am entitled, and indeed, bound, to have regard to the reasoning by which that result was arrived at. It is worthy of remark that the principle for which the plaintiffs contend, not depending upon the existence of any mistake, was not adumbrated by any of the learned counsel engaged in the case, either for the purpose of asserting or demolishing the principle. Nor is the existence of the principle referred to by the learned judge. As I read his judgment, Maugham J. (as he then was) was postulating that apart from any right to follow assets, if capable of being traced, the only other remedy open to the next of kin of a deceased person making a money demand in respect of money or property paid or transferred to the wrong person, is by a claim for money had and received at common law, or by an analogous claim in equity.

Upon this review of the authorities, I have come to the conclusion that the principle for which the plaintiffs contend is unsupported by the authorities, is against the weight of the authorities, and, as a head of equity, does not exist.

In my judgment, the authorities establish that so far as a mere money demand is concerned (and I am, as regards this part of the matter, dealing only with a money demand) where the executor or administrator has paid money or transferred property part of the estate of the deceased to a person not entitled thereto in such circumstances as not to make the recipient an express trustee, the only remedy open to the legatee or next of kin rightfully entitled against the recipient is either to pursue a common law claim for money had and received in the name of the executor or administrator, or to pursue in equity a claim analogous to the common law action for money had and received, in which it would be unnecessary to join the executor or administrator as plaintiff. In either case, however, as I have shown, it would be essential to demonstrate that the money was paid under a mistake of fact and not a mistake of law, a mistake in construing a will being regarded for this purpose as a mistake of law.

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(1) [1910] 1 K. B. 56.

There are, of course, cases in which equity, in the exercise of its remedial jurisdiction, will intervene to grant relief such as rescission, which may involve the repayment of money, and for the purpose of granting such relief will not treat as fatal a mistake of law. I am not concerned to state the ambit of this jurisdiction. It is sufficient to say that this case, being a claim based on a mere money demand, is outside that class of case. In my judgment, the words of James L.J. in *Rogers* v. *Ingham* (1), which I have already quoted, and which I will again repeat, namely: " I have no doubt that there are some " cases which have been relied on, in which this court has not " adhered strictly to the rule that a mistake in law is not always " incapable of being remedied in this court; but relief has never " been given in the case of a simple money demand by one " person against another, there being between those two " persons no fiduciary relation whatever, and no equity to " supervene by reason of the conduct of either of the parties " —are as true to-day as they were when spoken in 1876, and the subsequent authorities only serve to emphasize their correctness.

The next point advanced on behalf of the plaintiffs was that upon the undisputed facts, to which I have already referred, they were entitled to follow the moneys paid by the executors to the respective defendant institutions into the hands of those institutions; and that, as in each case the money received had been paid into a banking account kept by the recipient with its bankers, the plaintiffs, upon the principles laid down in *In re Hallett's Estate* (2), were entitled to trace the money into the banking account, and also out of the account; and further, that where, upon such tracing out of the account, assets could be discovered in the hands of the recipient, representing wholly or in part the application of the money so received, the plaintiffs were entitled to an equitable charge upon such assets to secure the amount of the money so traced into the assets.

Now, for the purposes of the argument on this part of the case, the plaintiffs' counsel admitted that upon the receipt by the defendant institutions respectively of the payments made to them by the executors, the defendant institutions became neither trustees, nor clothed with any fiduciary character, and that this position obtained until the receipt in October or November, 1939, by the respective defendant institutions of the warning letters from Mr. Wintle, to which I have referred earlier in this judgment. The plaintiffs' counsel were clearly constrained to make this admission, in view of their admission upon their second point, namely, that they could not maintain in this court that any of the defendant institutions took with notice of the trust in favour of the plaintiffs.

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(1) 3 Ch. D. 351, 355.

(2) (1879) 13 Ch. D. 696.

In view of this admission, it becomes desirable to advert shortly to the right of following an asset at common law, and to the equitable doctrine of tracing (which is more extensive in its scope than the common law right) and to the principles upon which the respective rights are based.

At common law there is a right in the owner of an asset, who is deprived of the possession thereof, to follow that asset into whosoever hands it may come, and, notwithstanding that it may change its form, so long as he retains the property in the asset in its original or converted form; *Miller* v. *Race* (1), and *Banque Belge Pour L'Etranger* v. *Hambrouck* (2); and so long as the means of identifying the asset (in its original or converted form) continue to exist. The right is essentially a right in rem, and the difficulty which is usually encountered is the difficulty of continued identification, where the asset sought to be followed is money, or has at some stage of the chain of events been converted into money. As Lord Haldane L.C. said in *Sinclair* v. *Brougham* (3): "In most "cases money cannot be followed. When sovereigns or "bank notes are paid over as currency, so far as the payer is "concerned, they cease ipso facto to be the subjects of specific "title as chattels. If a sovereign or bank note be offered in "payment it is, under ordinary circumstances, no part of the "duty of the person receiving it to inquire into title. The "reason of this is that chattels of such a kind form part of what "the law recognizes as currency, and treats as passing from "hand to hand in point, not merely of possession, but of "property. It would cause great inconvenience to commerce "if in this class of chattel an exception were not made to the "general requirement of the law as to title." However, as Lord Haldane L.C., proceeds to show, the exception is not extended beyond the limits which necessity imposes.

In *Taylor* v. *Plumer* (4), Lord Ellenborough C.J., said:

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(1) (1758) 1 Burr. 452.

(2) [1921] 1 K. B. 321, 329.

(3) [1914] A. C. 398, 418.

(4) (1815) 3 M. & S. 562, 575.

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" It makes no difference in reason or law into what other form, " different from the original, the change may have been made, " whether it be into that of promissory notes for the security " of the money which was produced by the sale of the goods of " the principal, as in *Scott* v. *Surman* (1) or into other merchan-" dize, as in *Whitecomb* v. *Jacob* (2), for the product of or " substitute for the original thing still follows the nature " of the thing itself, as long as it can be ascertained to be such, " and the right only ceases when the means of ascertainment " fail, which is the case when the subject is turned into money, " and mixed and confounded in a general mass of the same " description. The difficulty which arises in such a case is a " difficulty of fact and not of law, and the dictum that money " has no ear mark must be understood in the same way, i.e., " as predicated only of an undivided and undistinguishable " mass of current money. But money in a bag, or otherwise " kept apart from other money, guineas, or other coin marked " (if the fact were so) for the purpose of being distinguished, " are so far ear marked as to fall within the rule on this subject, " which applies to every other description of personal property " whilst it remains (as the property in question did), in the " hands of the factor, or his general legal representatives."

In commenting on this passage, Lord Haldane L.C., in *Sinclair* v. *Brougham* (3) said : "Lord Ellenborough C.J. laid " down, as a limit to this proposition, that if the money had " become incapable of being traced, as, for instance, when it had " been paid into the broker's general account with his banker, " the principal had no remedy excepting to prove as a creditor " for money had and received. The explanation was, of course, " that a relation of debtor and creditor had arisen between the " banker and his client, the broker, which precluded the notion " of following the money."

The last sentence which I have read, if taken literally, would appear to support the conclusion that the payment of money by a holder thereof into his banking account in any circumstances would destroy the right of the true owner to follow the money at common law. I do not, with respect, think that Lord Haldane L.C., intended his words to have such a far reaching effect, and I do not think that he intended them to have the effect of denying to the true owner the right to follow his money, when it has been paid by the person against whom it is sought to follow it, into a separate account at his bankers into which no other moneys are paid. It is true that the result of such payment in is, as regards that money, to create the relationship of debtor and creditor, and to substitute for the money a chose in action, but there has been "no mixing and "confounding of the money in a general mass of the same "description," to use the words of Lord Ellenborough C.J.

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(1) (1742) Willes, 400.

(2) (1710) Salk. 160.

(3) [1914] A. C. 398, 419.

That that is the true view is, I think, borne out by the language of Lord Ellenborough C.J. in the passage from *Taylor* v. *Plumer* (1), which I have already quoted, and from the judgments of the Court of Appeal in *Banque Belge Pour L'Etranger* v. *Hambrouck* particularly that of Bankes L.J. (2), and that of Atkin L.J. (3).

I therefore hold that where a person, other than the true owner thereof, pays money into an account at his bank, and does not mix with that money any other money, either his own, or that of any other person, the true owner of the money can at common law follow it into that account, and further can follow it out of the account into any asset or assets which can be shown to have been purchased wholly with it.

The common law right of following property depends in no degree upon the existence of any fiduciary relationship. This is conclusively demonstrated by Lord Haldane L.C. in *Sinclair* v. *Brougham* (4), where he says: "My Lords, it is, in my "opinion, impossible to confine the right at law to follow to "cases where there was a fiduciary relationship. The principle "appears to me to cover all cases where the property in the "money has not passed, and the money itself can be ear-"marked in the hands of the person who has wrongfully "obtained it. A person standing in a fiduciary relation "may be in this position, but it is not because of his trust "or fiduciary duty. The common law, which we are now "considering, did not take cognizance of such duties. It looked "simply to the question whether the property had passed, "and if it had not, for instance, where no relationship of debtor "and creditor had intervened, the money could be followed, "notwithstanding its normal character as currency, provided "it could be earmarked or traced into assets acquired with it. "And this appears to me to be, on ground of principle, as true "of money paid under mistake of fact or on an ultra vires "contract, under which no property could pass or relation of

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(1) 3 M. & S. 562.

(2) [1921] 1 K. B. 321, 328.

(3) Ibid. 335.

(4) [1914] A. C. 398, 420.

" debtor be constituted, as it is true in the case of a broker or " bailee."

The common law right of following thus had the advantage that the person seeking to exercise it need not assert and prove any fiduciary relationship; but at the same time it had the disadvantage that whenever the identity of the res ceased in fact the remedy was gone. In the case of money, as I have already shown, whenever money, the res, is mixed with other money, the identity of the res is gone and the right to follow is at an end, a result which led Lord Haldane L.C., to say: " In most " cases money cannot be followed " (1). It will thus be seen that as regards money the common law right of following property is distinctly limited in scope.

It was because of this limitation of the scope of the common law right that equity—which, as pointed out by Lord Haldane L.C. had so far exercised a concurrent remedy based upon trust—gave a further remedy, namely, what is conveniently called a right to trace. For the purposes of this case it is essential, for reasons which will appear later in this judgment, to have clearly in mind not only what is the nature and extent of the right of tracing in equity, but also, and indeed primarily, what are the principles upon which that right is rested.

The leading case on this matter is *In re Hallett's Estate* (2) to which I must refer in some little detail. The principles enunciated in this case are frequently referred to as the rule in *Hallett's* case, but it is important to observe at the outset that two distinct points emerge from the case: First, that in certain circumstances, which I shall deal with, money which has been paid into a banking account, and there mixed with other money, can be followed into that account notwithstanding that mixing; and, secondly, after the entry into the account has been made, how the account is to be unravelled for the purpose of tracing the money through and out of the account.

The first of thse two points is dealt with under the heading of " Claim of Mrs. Cotterill " (3). Mr. Hallett, a solicitor, held certain bonds on behalf of Mrs. Cotterill, a client of his, and therefore stood in a fiduciary position towards her. He improperly sold these bonds and put the money, the proceeds of such sale, to his general account at his bankers. The money remained at his bankers mixed with his own money at the time of his death—that is, he had not drawn out that money from his bankers. In that position of matters, Mrs. Cotterill claimed to be entitled to receive the proceeds, or the amount of the proceeds, of the bonds out of the money in the hands of Mr. Hallett's bankers at the time of his death, and the claim was allowed.

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(1) [1914] A. C. 398, 420.

(2) 13 Ch. D. 696.

(3) Ibid. 707.

The basis upon which the claim was allowed, involving as it did entering the mixed account, was that Mr. Hallett stood in a fiduciary position towards Mrs. Cotterill. Sir George Jessel M.R., said (1): "The modern doctrine of equity as "regards property disposed of by persons in a fiduciary position "is a very clear and well established doctrine. You can, if the "sale was rightful, take the proceeds of the sale, if you can "identify them. If the sale was wrongful, you can still take "the proceeds of the sale, in a sense adopting the sale for the "purpose of taking the proceeds, if you can identify them. "There is no distinction, therefore, between a rightful and a "wrongful disposition of the property, so far as regards the "right of the beneficial owner to follow the proceeds. But it "very often happens that you cannot identify the proceeds. "The proceeds may have been invested together with money "belonging to the person in a fiduciary position, in a purchase. "He may have bought land with it, for instance, or he may have "bought chattels with it. Now, what is the position of the "beneficial owner as regards such purchases? I will, first of "all, take his position when the purchase is clearly made with "what I will call, for shortness, the trust money, although it is "not confined, as I will show presently, to express trusts. "In that case, according to the now well established doctrine "of equity the beneficial owner has a right to elect either to take "the property purchased, or to hold it as a security for the "amount of the trust money laid out in the purchase; or, as "we generally express it, he is entitled at his election either "to take the property, or to have a charge on the property for "the amount of the trust money. But in the second case, "where a trustee has mixed the money with his own, there is "this distinction, that the cestui que trust, or beneficial owner, "can no longer elect to take the property, because it is no "longer bought with the trust money simply and purely, but "with a mixed fund. He is, however, still entitled to a charge "on the property purchased, for the amount of the trust "money laid out in the purchase; and that charge is quite

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(1) 13 Ch. D. 696, 708.

" independent of the fact of the amount laid out by the trustee. " The moment you get a substantial portion of it furnished " by the trustee, using the word ' trustee ' in the sense I have " mentioned, as including all persons in a fiduciary relation, " the right to the charge follows. That is the modern doctrine " of equity."

Sir George Jessel M.R., then dealt with the suggestion that there was a distinction in this regard between " an express " trustee, or an agent or a bailee, or a collector of rents, or " anybody else in a fiduciary position " (1), and stated in emphatic terms that there was no such distinction. He then concluded (2): " Therefore the moment you establish the " fiduciary position, the modern rules of equity, as regards " following trust money, apply."

Later in his judgment, the Master of the Rolls quotes from the judgment of Wood V.-C., in *Frith* v. *Cartland* (3), where the learned Vice-Chancellor says (4): " The guiding principle is, " that a trustee cannot assert a title of his own to trust property. " If he destroys a trust fund by dissipating it altogether, there " remains nothing to be the subject of a trust. But so long as " the trust property can be traced and followed into other " property into which it has been converted, that remains " subject to the trust. A second principle is, that if a man " mixes trust funds with his own, the whole will be treated as " the trust property, except so far as he may be able to " distinguish what is his own."

Sir George Jessel M.R. adds: " that is that the trust property " comes first." Finally, after reviewing the authorities, the Master of the Rolls says (5): " I think after those authorities " it must now be considered settled that there is no distinction, " and never was a distinction, between a person occupying one " fiduciary position or another fiduciary position as to the right " of the beneficial owner to follow the trust fund." Both Baggallay L.J. and Thesiger L.J., in agreeing with the conclusion of Sir George Jessel M.R., based their judgments upon the existence of the fiduciary duty owed by Mr. Hallett to Mrs. Cotterill.

Pausing here, it appears to me to follow from a perusal of the judgments in *In re Hallett's Estate* (1) on the claim of Mrs. Cotterill that, so far as the authority of that case goes, the

(1) 13 Ch. D. 696, 709.
(2) Ibid. 710.
(3) (1865) 2 H. & M. 417, 420.
(4) 13 Ch. D. 696, 719.
(5) Ibid. 720.

equitable doctrine of allowing tracing into a mixed mass, particularly into a banking account where the tracer's money has been mixed with other money, is rested upon the existence of a fiduciary relationship between the person into whose banking account the money has been paid and the true owner; that the existence of that fiduciary relationship is a condition precedent to entering the banking account where the moneys have been mixed; and, therefore, that where that fiduciary relationship does not exist, there is no right in equity to trace into the mixed account. In other words, it is the existence of the fiduciary relationship which enables equity to give that further remedy to which Lord Haldane L.C. referred in *Sinclair* v. *Brougham* (1).

The second point, which was decided in *In re Hallett's Estate* (2), arose in this way: Mr. Hallett, being the trustee of some bonds, improperly sold them, and by his direction the proceeds were paid to his credit at his bankers and there mixed with moneys belonging to himself in the same banking account; and he also drew by ordinary cheques moneys from the banking account which he used for his own purposes. At his death in 1878 there was more money to the credit of the account than the sum of trust moneys paid into it; but if, applying the rule in *Clayton's* case (3), every payment made after the payment in of the trust moneys were applied to the first items on the credit side in order of date, a large portion of the trust moneys would have been paid out. The question was whether or not, in these circumstances, the moneys drawn out by Mr. Hallett, after the payment in of the trust moneys, were to be treated as the repayment of his own moneys, or whether they were to be treated as appropriated so as to diminish the amount applicable to the trust funds.

Sir George Jessel M.R., first considered the matter on principle and observed (1): "Now, first upon principle, "nothing can be better settled, either in our own law, or, "I suppose, the law of all civilized countries, than this, that "where a man does an act which may be rightfully performed, "he cannot say that act was intentionally and in fact done "wrongly." Having then given a series of examples, he observes: "That is the universal law." He then proceeds (4): "When he came to apply that principle to the case of a trustee "who has blended trust moneys with his own, it seems to me

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(1) [1914] A. C. 398, 420.
(2) 13 Ch. D. 696.
(3) (1816) 1 Mer. 572.
(4) 13 Ch. D. 696, 727.

" perfectly plain that he cannot be heard to say that he took " away the trust money when he had a right to take away " his own money."

Having dealt with what he describes as the simplest case of the mingling of trust money in a bag with the trustee's own, he proceeds (1): " What difference does it make if, instead of " being in a bag, he deposits it with his banker, and then pays " in other money of his own, and draws out some money for " his own purposes? Could he say that he had actually " drawn out anything but his own money? His money was " there, and he had a right to draw it out, and why should the " natural act of simply drawing out the money be attributed to " anything except to his ownership of money which was at his " bankers?"

Sir George Jessel M.R., then proceeds in the succeeding paragraph to demonstrate that, wherever the fiduciary position exists, then in unravelling the banking account where the trust and other moneys have been mixed, the rule in *Clayton's* case (2), which is a rule of convenience, based upon a presumed intention, must give way to the application of the principle in respect of which I have quoted him. His language is as follows (3): " It is said, no doubt, that according to the " modern theory of banking, the deposit banker is a debtor " for the money. So he is, and not a trustee in the strict sense " of the word. At the same time one must recollect that the " position of a deposit banker is different from that of an " ordinary debtor. Still, he is for some purposes a debtor, " and it is said if a debt of this kind is paid by a banker, " although the total balance is the amount owing by the banker, " yet considering the repayments and the sums paid in by the " depositor, you attribute the first sum drawn out to the first " sum paid in. That was a rule first established by Sir William " Grant in *Clayton's* case (2); a very convenient rule, and " I have nothing to say against it unless there is evidence either " of agreement to the contrary or of circumstances from which a " contrary intention must be presumed, and then, of course, " that which is a mere presumption of law gives way to those " other considerations. Therefore, it does appear to me there " is nothing in the world laid down by Sir William Grant in " *Clayton's* case (2), or in the numerous cases which follow it, " which in the slightest degree affects the principle, which I " consider to be clearly established."

(1) 13 Ch. D. 696, 727.

(2) 1 Mer. 572.

(3) 13 Ch. D. 728.

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Having dealt with a difficulty with which Fry J. supposed himself to be faced by the decision of the Court of Appeal in *Pennell* v. *Deffell* (1), Sir George Jessel M.R. said (2): "No "human being ever gave credit, even beyond that theory, "that he should not only misappropriate trust moneys to "increase his assets, but that he should pay the trust moneys "so misappropriated to his own banking account with his own "moneys, and draw out after that a larger sum than the first "sums paid in for the trust moneys."

Baggallay L.J., based his judgment upon the same considerations. In the course of his judgment, he said (3): "But, dealing with the decision of the Lords Justices in "*Pennell* v. *Deffell* (1), as I find it reported, I cannot regard "it as satisfactory, if it is to be considered as establishing "as a general proposition that in all such cases as that then "under their consideration, the presumption of an honest "intention on the part of the trustee is to be altogether disregarded, however favourable to such a presumption the "circumstances of any particular case may be, and that the "rule of appropriating in strict order of date the drawings "out to the payments in is alone to be applied. On the "contrary, I entertain a very decided opinion that in cases "like *Pennell* v. *Deffell* (1) or in such as that which is the "subject of the present appeal, full effect should be given "to the principle of attributing the honest intention whenever "the circumstances of the case admit of such a presumption. "It may, of course, happen that, through the acts of a trustee "whether wilfully dishonest or not, the ultimate balance may "not be sufficient to meet the full amounts of all the trust "moneys which may have been paid into a blended banking "account, and the question then raised may be as to the various "claims in respect of distinct trusts; in such a case the strict "application of the general rule of appropriating in order of "date the drawings out to the payments in may, and probably "would, be correct. But in a case of another class, in which, "as in that under consideration, the trustee has paid in trust "moneys to the credit of his private account, and in his subsequent dealings with that account for his private purposes has "never reduced his balance below the amount of the trust "moneys so paid in, it is, to my mind, difficult to attribute to "the trustee any other intention than that of appropriating

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(1) (1853) 4 De G. M. & G. 372.

(2) 13 Ch. D. 696, 730.

(3) Ibid. 742.

"his drawings to his own private moneys, so as to leave the "trust moneys intact."

Thesiger L.J. dissented from the majority, taking the view that the Court of Appeal was bound by the previous decision of that court in *Pennell* v. *Deffell* (1).

Now the effect of this second part of the judgment in *In re Hallett's Estate* (2) is that, once the banking account into which the money sought to be traced has been paid has been entered, the application of the rule in *Clayton's* case (3) is displaced for the same reason as that, by reason of the existence of which equity allows the account to be entered, namely, the fiduciary relationship between the person who has paid in the money sought to be traced and the true owner. The fiduciary position is treated as a circumstance which displaces the presumed intention upon which the application of the rule in *Clayton's* case (3) depends: because as between the trustee or the person owing a fiduciary duty upon the one hand, and the beneficiary or person owed the fiduciary duty upon the other hand, it must be presumed that the trustee or fiduciary agent intended to act honestly, and effect can only be given to that intention by treating drawings out of the account, as drawings by the trustee or fiduciary agent of his own moneys. It may well be, as is suggested by Baggallay L.J., that the rule in *Clayton's* case (3) will obtain as between respective beneficiaries whose moneys have been mixed by their trustee in one banking account.

Now it is to be observed that the doctrine is artificial in that it is based upon a presumed intention, namely, that the trustee or fiduciary agent intended to act honestly, when in most cases, of which *In re Hallett* (2) itself forms an example, the contrary is the fact. In the usual case there is a deficiency; the competition is between the beneficiary and the creditors of the trustee or fiduciary agent; and the position has been brought about by the improper and generally dishonest motive of the trustee or fiduciary agent. This improper or dishonest motive neither he nor those who claim under him are allowed to set up; and it is presumed (usually quite contrary to the fact) that all along he was filled with a proper and honest intent.

Here I may observe in passing that I place no weight on the circumstance upon which the plaintiffs' counsel relied strongly: namely, that all the reported cases relating to tracing deal with

(1) 4 De G. M. & G. 372.

(2) 13 Ch. D. 696.

(3) 1 Mer. 572.

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a deficiency, because as was pointed out by Sir Richard Kindersley V.-C., in *Hopper* v. *Conyers* (1), the test must always be as between the trustee or fiduciary agent and the person seeking to follow or trace. The creditors of the trustee or fiduciary agent cannot stand in a better position than he could.

I have been at pains to emphasize the artfiicial element in the equitable doctrine of tracing, because, in my view, it serves to underline the truth that in the evolution of this doctrine equity did no more, and at the same time did no less, than have recourse to its age-old expedient of fastening upon the conscience of the person against whom it intended to extend the remedy.

The decision of *In re Hallett's Estate* (2), if I may so put it, reeks of trust and fiduciary relationship, and the two points, which emerge from the judgments and with which I have dealt above are, as I have shown, based by the express language of the court upon the existence of trust or fiduciary relationship.

Upon the doctrine of tracing in equity, as enunciated in *In re Hallett's Estate* (2), certain refinements have been engrafted, which, however, in no way affect the principles upon which the decision is rested, but which indeed are wholly consistent with the logical working out of those principles.

In *In re Oatway* (3), it was held that where a trustee paid trust money into his banking account, whereby it became mixed with his own money, and out of moneys drawn from the account purchased an investment in his own name, but subsequently applied the balance to his own purposes, his representatives cannot successfully maintain that the investment was purchased out of the trustee's own money, and that what has been spent, and can no longer be traced and recovered, was the money belonging to the trust.

In *Roscoe* (*Bolton*), *Ld.* v. *Winder* (4) it was held that payments into a general account cannot, without proof of express intention, be appropriated to the replacement of trust money which has been improperly mixed with that account and drawn out. In his judgment Sargant J. (as he then was) said (5): "In a case where the account into which the moneys are paid "is the general trading account of the debtor on which he has "been accustomed to draw both in the ordinary course and "in breach of trust when there were trust funds standing to the "credit of that account which were convenient for that purpose,

(1) (1866) L. R. 2 Eq. 549, 553.
(2) 13 Ch. D. 696.
(3) [1903] 2 Ch. 356.
(4) [1915] 1 Ch. 62.
(5) Ibid. 69.

"I think it is impossible to attribute to him that by the mere "payment into the account of further moneys, which, to a large "extent, he subsequently used for purposes of his own, he "intended to clothe those moneys with a trust in favour of the "plaintiffs.

"Certainly, after having heard *In re Hallett's Estate* (1) "cited over and over again, I should have thought that the "general view of that decision was that it only applied to such "an amount of the balance ultimately standing to the credit of "the trustee as did not exceed the lowest balance of the account "during the intervening period. That view has practically "been taken, as far as I can make out, in the cases which have "dealt with *In re Hallett's Estate* (1). *In re Oatway* (2), "a decision of Joyce J., was cited to me in support of the "plaintiff's case but I do not find anything in it to help them. "All that Joyce J. did in that case was to say that, if part of "the mixed moneys can be traced into a definite security, that "security will not become freed from the charge in favour of "the trust, but will, together with any residue of the mixed "moneys, remain subject to that charge. I am sure that "nothing which he said was intended to mean that the trust "was imposed upon any property into which the original fund "could not be traced."

It is significant to observe that the decision in the latter case was given after the decision of the House of Lords in *Sinclair* v. *Brougham* (3), to which I shall have to refer later in this judgment, and that Sargant J. neither showed any inclination to extend the doctrine of tracing as laid down in *In re Hallett's Estate* (1), nor regarded that doctrine as having been affected by the decision in *Sinclair* v. *Brougham* (3).

Many cases involving the equitable doctrine of tracing have come before the courts of equity since the decisions in *In re Hallett* (1) in 1879 and 1880, but (apart from the case of *Sinclair* v. *Brougham* (3)) I do not consider it necessary to refer to more than the authorities to which I have already referred. The difficulties which have arisen have not arisen upon any doubt as to the principles underlying the decisions in *In re Hallett's Estate* (1) but in the application of those principles to the facts of particular cases. One conclusion appears to me to be clear, namely, that, putting aside for the moment the case of *Sinclair* v. *Brougham* (3) there is no case in the books (and in this regard I do not omit from account the cases of *Buckeridge* v. *Glasse* (1) and *Thompson* v. *Finch* (2)) from which it could be asserted that the equitable right of tracing is available against a person who, at the time of receiving the money sought to be traced, and which he has mixed with his own in his banking account, owed no fiduciary duty to the true owner: while on the other hand the whole weight of the authority of *In re Hallett's Estate* (3) and the cases which have followed it is without exception to the contrary.

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(1) 13 Ch. D. 696.

(2) [1903] 2 Ch. 356.

(3) [1914] A. C. 398.

It is no part of the defendants' case to dispute that, if a volunteer receives trust money or property without knowledge that it is subject to a trust but subsequently receives such notice and is still in possession of the trust money or property, he, being a volunteer, cannot maintain his title against those entitled under the trust. On the other hand, it is no part of the plaintiffs' case that the notice given to the defendant institutions by the respective warning letters could, in any sense, be related back to the respective dates of receipt by them of the moneys paid to them by the executors, or that the defendant institutions could be clothed with any fiduciary character prior to the receipt of the warning letters. I have, however, considered it necessary to examine at some length the decision in *In re Hallett's Estate* (3) because of the way in which the plaintiffs' case has been put.

Mr. Hayward and Mr. Fawell appeared to me to differ somewhat in the way they presented their arguments. As I understood him, Mr. Hayward's argument admitted the necessity of establishing an equity affecting the conscience of the proposed defendant, though I think his argument involved this, that it was unnecessary to demonstrate that the defendant's conscience was affected until after the machinery of tracing had been applied and worked out. He asserted a general equity arising first, because of the circumstance that money or other property of the proposed plaintiff, through no fault of his, had somehow got into the hands of the defendant, a volunteer, not clothed with any fiduciary character at the time of the receipt thereof; secondly, because, as a result, the defendant at the date of the claim might or might not hold an asset representing in whole or in part the money or other property of the plaintiff or some part of it; and thirdly, because if that should turn out to be the case, then the defendant was in possession of a superfluity which it would be against conscience to allow him to retain.

(1) (1840) Cr. & Ph. 126.
(2) (1856) 8 De G. M. & G. 560.
(3) 13 Ch. D. 696.

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He therefore claimed that for the purpose of ascertaining whether or not that superfluity existed, the plaintiff should be entitled to have applied in his favour the machinery of tracing described in the second part of *In re Hallett's Estate* (1), without having to establish the presumed intention of the defendant upon the existence of which the reasoning in that case proceeded. That is, you enter the banking account and unravel it, not because you have shown that the defendant has a tender conscience, in which case your inquiry is directed to ascertaining how much he still retains against his conscience, but in order to see whether at the end of the inquiry it can be predicated of the defendant for the first time that he has a tender conscience and, if so, to what extent.

Mr. Fawell as I understood him, put the matter somewhat differently. He said that in all cases where property belonging to A has somehow got into the possession of B without any intention upon the part of A. to make a gift, the law gives a right to follow such property, so long as the property or the property into which it may have been converted can be identified. Whenever the right at law fails because of some change in the property which makes identification impossible, equity will assist. In so assisting to supplement the legal right to follow, equity acts in rem, and operates on the res and not on the conscience of the person in whose possession it is.

I think the difference between the two ways of presenting the matter is more apparent than real; because Mr. Fawell's reasoning clearly involves this result, that, if at the end of the tracing, property belonging to A is found to be in the hands of B in the circumstances predicated, it would be against B's conscience to retain it.

If, therefore, I have rightly understood the arguments of the plaintiffs' counsel, they involve this: that the question of the defendants' conscience is not material at the start of the tracing, as a condition precedent to equity allowing the tracing to be undertaken, but, at the most, at the end of the inquiry, if as a result thereof a superfluity should be found in the defendants' hands.

They maintain that the right to the machinery of tracing for which they contend is supported by authority, or if not, is justified on principle, and, in so far as acceding to their contention would represent an extension of the equitable doctrine of tracing, that extension should be made.

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(1) 13 Ch. D. 696.

I must therefore proceed to consider first whether the plaintiffs' counsel are right in their contention that the proposition for which they contend is supported by authority. Virtually speaking, the only authority upon which they rely is confined to one case, but one of the greatest importance, namely: the decision of the House of Lords in *Sinclair* v. *Brougham* (1). The plaintiffs contend that upon a true view, this case is authority for the proposition that the machinery of a tracing order can be applied to a case where the person, against whom the tracing order is sought, did not stand in a fiduciary relationship to the person seeking the order at the time of receipt of the property or money sought to be traced. The defendants, on the other hand, contend that, properly understood, the case of *Sinclair* v. *Brougham* (1) is no more than an application of the first point decided in *In re Hallett's Estate* (2), that is that it predicated, for the purpose of getting into the mixed mass of money dealt with in that case, that there was a fiduciary relationship, and that, in so far as there could be said to have been any departure from the strict application of the second part of the decision in *In re Hallett's Estate* (2), that departure lay in the decision to divide the mixed mass between the two competing sets of claimants in proportion to their respective contributions to what the mass represented, because the machinery for unravelling the mass laid down in the second part of the decision in *In re Hallett's Estate* (2) could not in the circumstances be applied. The immediate question, therefore, is which of these views is correct?

For this purpose I must embark on a detailed consideration of the facts in *Sinclair* v. *Brougham* (1) and of what was decided in that case.

The relevant facts were that a building society formed in 1851 and empowered by its rules to borrow to an unlimited extent started and developed a banking business. In 1911, the society was ordered to be wound up and questions of priority arose between the outside creditors, the unadvanced shareholders and the bank customers on current and deposit account (to whom I will refer as " the depositors "). The assets were insufficient for payment of all the claimants in full but were more than sufficient for payment of the outside creditors (who were subsequently paid by arrangement) and the shareholders. It was held that the power to borrow must be limited to borrowing for the proper objects of the society and that the carrying

(1) [1914] A.C. 398. (2) 13 Ch. D. 696.

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on of the banking business was ultra vires. Secondly, it was held that the depositors were not entitled to recover moneys paid by them on an ultra vires contract of loan on the footing of money had and received by the society to their use.

It was however, held thirdly—I read from the headnote (1)—: "Applying the principle of *In re Hallett's Estate* (2) that the "assets remaining after payment of the outside creditors must "be taken to represent in part moneys which the depositors "could follow, as having been invalidly borrowed, and in part "moneys which the society could follow, as having been "wrongfully employed by its agents in the banking business, "and (subject to any application by any individual depositor "or shareholder with a view to tracing his own money into any "particular asset, and to the costs of the liquidation) ought to "be distributed pari passu between the depositors and the "unadvanced shareholders according to the amounts respec"tively credited to them in the books of the society at the "commencement of the winding-up."

Now, as I shall show, at the root of the decision lie the circumstances that, as the carrying on of the banking business was ultra vires the society, the directors of the society, and not the society itself, must be deemed to have carried on that business and the moneys constituting the mass in the hands of the liquidators must be deemed to represent moneys received from the society and the depositors by the directors; that the directors so receiving such moneys stood in a fiduciary relationship to the society and the depositors: that, in expending the moneys so received, the directors had acted wrongfully and in breach of trust: that they had done so to the knowledge of both the society and the depositors: and that, as between the society and the depositors, the equities were equal.

If this be a correct view of the matter, then it appears to me that so far as the first part of *In re Hallett's Estate* (2) is concerned, this case represents a strict application of the principle there enunciated for the purpose of effecting entry into the mass in the hands of the liquidator, and that the only departure (if it be one) from *In re Hallett's Estate* (2) occurs as regards the second point in the division of the mass between the two competing classes, because of the practical impossibility of tracing. The departure would appear to be more apparent than real, because if, as in my view was the position, it was a case of a fund held on behalf of two sets of beneficiaries, the machinery of tracing dealt with in the second part of *In re Hallett's Estate* (1) would not have been applicable, even if it could have applied. It appears to me, therefore, that the only relevance of *In re Hallett's Estate* (1) in *Sinclair* v. *Brougham* (2) was for the purpose of effecting entry into the mass.

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(1) [1914] A. C. 398.

(2) 13 Ch. D. 696.

Lord Haldane L.C. having dealt with the claim for money had and received proceeded as follows (3): "But while the "common law gave the remedy I have stated, it gave no "remedy when the money had been paid by the wrongdoer "into his account with his banker, who simply owed him a "debt, so that no money was or could be, in the contemplation "of a court of law, earmarked. Here equity, which had so far "exercised a concurrent jurisdiction based upon trust, gave a "further remedy. The Court of Chancery could and would "declare, even as against the general creditors of the wrongdoer, that there was what it called a charge on the banker's "debt to the person whose money had been paid into the latter's "bank account in favour of the person whose money it really "was. And, as Jessel M.R. pointed out in *Hallett's* case (1), "this equity was not confined to cases of trust in the strict "sense, but applied at all events to every case where there was a "fiduciary relationship. It was, as I think, merely an additional "right, which could be enforced by the Court of Chancery in "the exercise of its auxiliary jurisdiction, wherever money was "held to belong in equity to the plaintiff. If so, subject to "certain qualifications which I shall presently make, I see no "reason why the remedy explained by Jessel M.R. in *Hallett's* "case (1), of declaring a charge on the investment in a debt due "from bankers on balance, or on any mass of money or "securities with which the plaintiff's money had been mixed, "should not apply in the case of a transaction that is ultra "vires. The property was never converted into a debt, in "equity at all events, and there has been throughout a "resulting trust, not of an active character, but sufficient, in my "opinion, to bring the transaction within the general "principle."

The object of that passage was to lead to the conclusion that there was no reason why the remedy explained by Sir George Jessel M.R. in *In re Hallett's Estate* (1) of declaring a charge should not apply in an ultra vires transaction. That is, Lord Haldane L.C. was only seeking to apply a known principle

(1) 13 Ch. D. 696.

(2) [1914] A. C. 398.

(3) Ibid. 420.

of equity and not to extend such principle or to make a new head of equity. In referring to the principle, he refers to the condition upon which its applicability depends, namely, the existence of a fiduciary relationship, and underlines this aspect of the matter in the last sentence of the paragraph. He says (1): "there has been throughout a resulting trust." The word "throughout" is vital. There could not be a resulting trust, however dormant, over a period during which the recipient of the money sought to be traced was not, in any sense, a fiduciary agent.

Again, Lord Haldane said (2): "For the purpose of the "question before us the really relevant part of the judgment in "*Hallett's* case (3) is that which shows how the difficulty af "following money into a debtor and creditor account like a "banker's is got over in equity. The loan to the banker was "regarded as an investment pro tanto of the principal's money, "and the latter was treated as entitled to waive the breach of "duty by his agent, and to claim the investment to the extent "of the amount due to him as made on his behalf. The agent "could not set up that any part of the money in the bank was "his until he had made good his breach of duty, and in that "sense there was a charge.

"In the present case the investment was not made in breach "of a fiduciary duty on the part of the society, and it was "actually made with the authority of the depositors. What "was a material point in *Hallett's* case (3), therefore, does not "occur here. No doubt it was ultra vires of the society to "undertake to repay the money. But it was none the less "intended that in consideration of giving such an undertaking "the society should be entitled to deal with it freely as its "own. The consideration failed and the depositors had the "right to follow the money so far as invalidly borrowed into the "assets in which it had been invested, whether these assets "were mere debts due to the society or ordinary securities, "but that was their only right."

It was sought to be argued that that passage was authority for the proposition that for the purpose of effecting entry into a banking account, the person seeking to trace need not show that the recipient of the money into whose account it was paid stood in any fiduciary relationship at the time of receipt or payment in. For myself I do not consider that any

(1) [1914] A. C. 398, 421.
(2) Ibid. 422.
(3) 13 Ch. D. 696.

such far reaching proposition can be deduced from this or any other passage in Lord Haldane's speech.

In the first of the two paragraphs which I have just read, Lord Haldane L.C. demonstrates conclusively that, in order to pray in aid the first rule in *In re Hallett's Estate* (1) for the purpose of following money into a banking account, it is necessary to show that the person into whose account the money was paid was a fiduciary agent. In the second paragraph what Lord Haldane L.C. is explaining is that both the society and the depositors were tracers. The society did not owe the depositors any fiduciary duty and in that sense the case was different from *In re Hallett's Estate* (1). None the less, it is not right to say that *Sinclair* v. *Brougham* (2) is not a case in which any question of fiduciary relationship was involved. As is pointed out by Lord Haldane L.C., in the passage on which I have commented, and again (3), and as I shall show, even more clearly and expressly by Lord Parker, as the business was ultra vires the society, it had to be regarded as carried on improperly by the directors, the agents of the society and necessarily fiduciary agents.

I am, therefore, unable to regard Lord Haldane L.C.'s speech in *Sinclair* v. *Brougham* (4) as authority supporting the plaintiffs' proposition to which I have already referred.

Lord Dunedin said this (5): "Now I think it is clear that "all ideas of natural justice are against allowing A to keep the "property of B, which has somehow got into A's possession "without any intention on the part of B to make a gift to A." The plaintiffs' counsel relied very strongly upon this passage, and sought to put it forward as authority for their proposition that the receipt of the property of B by A, without any intention on the part of B to make a gift, constituted an equity in B entitling him to enter and investigate the banking account of A to discover whether A still retained the money or held an asset wholly or in part representing that money.

In my judgment to take this view would be to extract from the passage in question more than it contains. It is in my view essential to bear in mind the concrete problem to which Lord Dunedin was addressing himself, and which he states in these words (6): "What has happened is this. The "directors of the society have taken the moneys of the share-

(1) 13 Ch. D. 696.

(2) [1914] A. C. 398, 421.

(3) Ibid. 425.

(4) Ibid. 410.

(5) Ibid. 431.

(6) Ibid. 438.

"holders which they had a right to receive, and the moneys of "the depositors which they had not, and mixed them so that "they cannot be discriminated from each other, and have put "them, so to speak, into the society's strong-box where the "mixed mass is found by the liquidator."

It is clear from this passage that what Lord Dunedin was dealing with throughout his speech was a real superfluity existing in specie and not a mere superfluity in account. In the case before him, the facts established that the mass in the hands of the liquidator represented in fact the moneys of the depositors and the society. No question, therefore, such as that before me, arose for consideration in *Sinclair* v. *Brougham* (1), but it is to be observed that upon the footing of the statement of the facts by Lord Dunedin, which I have read, the fiduciary element was present, namely, the fiduciary duty owed by the directors to the society and the depositors, which would entitle either set of tracers to enter the mixed mass upon the authority of the first part of the rule in *In re Hallett's Estate* (2).

Again, I would observe that I can find no suggestion in the language used by Lord Dunedin to effect any extension of the equitable doctrine of tracing or to enunciate any new head of equity; or indeed to do anything more than to apply existing and well known principles to the particular facts before him.

It is true that Lord Dunedin said (3): "I have made these "citations to show that other great systems of law have not "been unable to solve the problem arising where the equity of "restitution comes in contact with the doctrine of nullity of "contract. Is English equity to retire defeated from the task "which other systems of equity have conquered? Let us for a "moment examine what the argument on the other side is. "There being no contract, it is impossible, it is said, to have "any obligation on the part of the society to restore what it "has taken from the depositors. The only right of the "depositors is a right to vindicate property; or, in other words, "when you have a jus in re you can enforce it; but if the thing "has so disappeared that a jus in re is no longer to be found "(and this must practically always be so in the case of money), "then your remedy is gone. The sole relief which equity can "give is that if you can show that your money has paid a just "debt, in that case you shall have action. This comes to this,

(1) [1914] A. C. 398, 410.

(2) 13 Ch. D. 696.

(3) [1914] A. C. 398, 435.

"that having got hold of property which does not belong to you, "if only you are wise or lucky enough to change its form you "may enjoy the proceeds unmolested. Such a plea on the face "of it seems only worthy of the Pharisee who shook himself "free of his natural obligations by saying Corban. In the words "of technical equity it is unconscionable."

The words "In the words of technical equity" (1) appear to me to supply the key to the whole passage. In the eye of equity (technical equity), it could only be unconscionable to retain the property if, after the application of the relevant rules of equity, the retention could still be said to be unconscionable. Now, if it be still true, as I think it is, that the application of the two rules in *In re Hallett's Estate* (2) depend upon the existence of a fiduciary relationship, it cannot be unconscionable in the eye of equity to retain money in circumstances where the identity of the money has in fact been lost, and where the rules of equity cannot be prayed in aid to preserve that identiy.

I think, therefore, that Mr. Andrew Clark was right in his submission that Lord Dunedin, in both the wide statements which I have read (3), was presupposing on the part of the recipient knowledge that the money belonged to some one else in equity, in other words, that there existed that fiduciary relationship which would admit the application of the rules in *In re Hallett's Estate* (2). Lord Dunedin nowhere sought to quarrel with or to cast doubt on those rules. He recognized the correctness of the first rule by his silence, and only referred to the case at all (4) to point out that on the facts before him the second part of *In re Hallett's Estate* (2) had no application.

I am therefore of opinion that the plaintiffs do not find support for their proposition in the speech of Lord Dunedin.

I now turn to the speech of Lord Parker. In the first place I desire to refer to certain passages, which in my judgment, establish beyond doubt that Lord Parker's reasoning proceeded on the basis that, on the facts of the case before him, the ultra vires business must be deemed to have been carried on by the directors who thus stood in a fiduciary relationship both to the depositors and to the society.

Lord Parker said (5): "Secondly it appears to be also well "settled that the lender in an ultra vires loan transaction has a "right to what is known as a tracing order. A company or

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(1) [1914] A. C. 398, 436.

(2) 13 Ch. D. 696.

(3) [1914] A. C. 398, 433, 435.

(4) Ibid. 438.

(5) Ibid. 441.

"other statutory association cannot by itself or through an "agent be party to an ultra vires act. If its directors or agents "affecting to act on its behalf borrow money, which it has no "power to borrow, the money borrowed is in their hands the "property of the lender. At law, therefore, the lender can "recover the money, so long as he can identify it, and even if it "has been employed in purchasing property, there may be cases "in which, by ratifying, the action of those who have so "employed it, he may recover the property purchased. Equity, "however, treated the matter from a different standpoint. "It considered that the relationship between the directors or "agents and the lender was a fiduciary relationship, and that "the money in their hands was for all practical purposes trust "money. Starting from a personal equity, based on the "consideration that it would be unconscionable for any one who "could not plead purchase for value without notice to retain "an advantage derived from the misapplication of trust money, "it ended, as was so often the case, in creating what were in "effect rights of property, though not recognized as such by the "common law."

That means that the basis of the right of tracing in such a case is the wrongdoing of the fiduciary agents, which makes applicable the first part of the rule in *In re Hallett's Estate* (1).

After referring to *In re Guardian Permanent Benefit Building Society* (*Grace-Calvert's* case) (2), Lord Parker said (3): "No "doubt at first sight it is difficult to be certain as to the "principles of equity to which Sir George Jessel M.R. referred. "But I think the difficulty may be solved by disentangling the "equity itself from the directions by means of which the court "endeavoured to give effect to it. The equity lay in this, that "it would be unconscionable for the society to retain the "amount by which its assets had been increased by, and in fact "still represented the borrowed money. It would be inequitable for the society to take advantage of the misappli"cation by its agents of money belonging to others and held by "them in a fiduciary capacity. In other words, it was the "same equity as that on which a tracing order is based."

Lord Parker states the particular case before him in these words (4): "The case, therefore, presents itself in this way. "Here is a mass of assets arising in the course of an ultra vires "business carried on by the directors and agents of the society.

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(1) 13 Ch. D. 696.

(2) (1882) 23 Ch. D. 440.

(3) [1914] A. C. 398, 440.

(4) Ibid. 448.

"There are, on the other hand, liabilities, how, or for what "purpose incurred, is not in evidence. No one claims any "interest in the assets except the ultra vires lenders, the "members of the society and the creditors, in respect of the "liabilities to which I have referred. The ultra vires lenders "and the members are willing that these liabilities and the "costs of the liquidation, which are in effect costs of administering the fund, shall be first paid. If this is done, what is "left may be taken to represent in part the moneys of the ultra "vires lenders and in part the moneys of the society wrongfully "employed in the business. The equities of the ultra vires "lenders and of the society are equal, and it follows that the "remainder of the assets ought to be divided between the "ultra vires lenders and the society rateably, according to the "capital amount contributed by such lenders and the society "respectively. This mode of distribution gives effect to all "the equities of the parties, and there is in it nothing necessarily inconsistent with the decision in the *Grace-Calvert* "case (1), for there the business actually carried on was intra "vires, and thus belonged to the society, except in so far as the "ultra vires lenders could establish any equitable claim. "It depends solely on the fact that the assets for distribution "being assets not of a legitimate but an ultra vires business "are not the assets of the society, except in so far as they can "substantiate some equity to them, and that such equity as "they have can arise only from an application of the same "principles to which the ultra vires lenders are themselves "entitled to have recourse."

These passages also appear to me to establish that Lord Parker treated the matter as one in which, because of the fiduciary position of the directors who carried on the ultra vires business, it was open both to the depositors and to the society to make entry into the mass of assets in the hands of the liquidator by invoking the first part of the rule in *In re Hallett's Estate* (2).

Having referred to these passages, I now turn to a most important passage from Lord Parker's speech which I must read in full (3). "The principle on which, and the extent to which, "trust money can be followed in equity is discussed at length in "*In re Hallett's Estate* (2) by Sir George Jessel M.R. He gives "two instances. First, he supposes the case of property being

(1) 23 Ch. D. 440.

(2) 13 Ch. D. 696.

(3) [1914] A. C. 398, 442.

"purchased by means of the trust money alone. In such a "case the beneficiary may either take the property itself or "claim a lien on it for the amount of the money expended "in the purchase. Secondly, he supposes the case of the "purchase having been made partly with the trust money and "partly with money of the trustee. In such a case the "beneficiary can only claim a charge on the property for the "amount of the trust money expended in the purchase. The "trustee is precluded by his own misconduct from asserting "any interest in the property until such amount has been "refunded. By the actual decision in the case, this principle "was held applicable when the trust money had been paid into "the trustee's banking account. I will add two further "illustrations which have some bearing on the present case. "Suppose the property is acquired by means of money, part "of which belongs to one owner and part to another, the "purchaser being in a fiduciary relationship to both. Clearly "each owner has an equal equity. Each is entitled to a charge "on the property for his own money, and neither can claim "priority over the other. It follows that their charges must "rank pari passu according to their respective amounts. "Further, I think that as against the fiduciary agent they could "by agreement claim to take the property itself, in which case "they would become tenants in common in shares proportioned "to amounts for which either could claim a charge. Suppose, "again, that the fiduciary agent parts with the money to a third "party who cannot plead purchase for value without notice, "and that the third party invests it with money of his own in "the purchase of property. If the third party had notice "that the money was held in a fiduciary capacity, he would be "in exactly the same position as the fiduciary agent, and could "not, therefore, assert any interest in the property until the "money misapplied had been refunded. But if he had no such "notice this would not be the case. There would, on his part, "be no misconduct at all. On the other hand, I cannot at "present see why he should have any priority as against the "property over the owner of the money which had, in fact, "been misapplied."

This passage, particularly the latter part, was strongly relied on both by the plaintiffs and the defendants. In my judgment, this paragraph, when carefully analysed and considered in its context, admits of no ambiguity.

In the first place it is clear that Lord Parker was not seeking in this passage to make any exhaustive statement of the principle on which, and the extent to which, trust money can be followed in equity. In the immediately preceding paragraph which I have already read, he is confining himself to the impact of equity upon an ultra vires transaction of lending, leading up to the conclusion that equity considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust moneys.

He then contents himself with observing that the principle on which, and the extent to which, trust money can be followed in equity is discussed at length in *In re Hallett's Estate* (1) by Sir George Jessel M.R. Then he refers to two instances given by Sir George Jessel M.R. In both of those instances the existence of the fiduciary relationship at the time of dealing with the trust money is postulated.

Lord Parker then adds two illustrations of his own. The first is put forward in these words (2): "Suppose the property is "acquired by means of money, part of which belongs to one "owner and part to another, the purchaser being in a fiduciary "relationship to both." That, in effect, was the case before him. In that case also the existence of the fiduciary relationship would enable either party to invoke the first rule in *In re Hallett's Estate* (1) and enter the mass, whether it consisted of specific property or a chose in action owed by his bankers to the person under the fiduciary duty, though when entry into the mass had been made, then, as between the two owners of the money, the equities would be equal.

His second illustration is introduced in these words (2): "Suppose, again, that the fiduciary agent parts with the money "to a third party who cannot plead purchase for value without "notice, and the third party invests it with money of his own "in the purchase of property." It is, I think, important to consider the scope of that illustration. In the discussion of the elements of a principle or the extent of its application, a hypothetical example is frequently of the greatest help, but only if its scope is clearly understood. In the illustrations which he gives, is Lord Parker postulating the mixing by the third party in his banking account of the money paid to him by the fiduciary agent with his own money before the investment is effected, or not?

Both views were urged before me. In favour of the view that

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(1) 13 Ch. D. 696.

(2) [1914] A. C. 398, 442.

Lord Parker did postulate such mixing is the undoubted circumstance that in practice the normal course which would be followed by the recipient, particuarly if he took without notice of the trust, would be to pay the money into his banking account. Against this consideration, however, must be set these considerations, first, that Lord Parker's statement of his illustration does not in terms involve any such mixing: secondly, that it was unnecessary for the purposes of the case before him to consider the effect of such mixing; and thirdly, that the second variation of this second illustration militates strongly, and as I think, conclusively against any such postulate.

Having stated the illustration Lord Parker gives two variations of it. In the first place, he postulates that the third party receiving the money has notice that it was held in a fiduciary capacity. In such an event, it would clearly be immaterial whether or not the money was mixed by the third party with money of his own, because in the language of Lord Parker (1), " he would be in exactly the same position as the fiduciary agent " and could not, therefore, assert any interest in the property " until the money misapplied had been refunded "; that is that both parts of the rule in *In re Hallett's Estate* (2) would be applied against him. In the second place, Lord Parker says: " But if he had no such notice this would not be the case. " There would on his part be no misconduct at all." That is, in such circumstances, he could not be deprived of the right to assert an interest in the property, except on the terms of first refunding the money received from the fiduciary agent. As between the third party and the true owner of the money paid by the fiduciary agent, the equities would be equal and for that reason Lord Parker concluded his observations; on this part of the matter with this sentence (1): " On the " other hand, I cannot at present see why he should have any " priority as against the property over the owner of the money " which had, in fact, been misapplied."

If Lord Parker, as I think was the case, did not have in mind any mixing of the two sets of moneys in the banking account of the third party prior to the investment, then the whole matter is plain, and the illustration amounts to this, that, as regards the first variation, it is a simple case of the application of both parts of the rule in *In re Hallett's Estate* (2): while, as regards the second illustration, it shows that upon the third party in fact receiving notice that the money paid to him was

(1) [1914] A. C. 398, 443.

(2) 13 Ch. D. 696.

held in a fiduciary capacity and upon proof that he still possesses an asset in part representing that money, the true owner can effect entry into the asset, so to speak, but not upon the terms of having any priority over the third party.

If, on the other hand, it were to be predicated that the money received from the fiduciary agent was first mixed by the third party with his own before the investment was made, he not then knowing that it was held in a fiduciary capacity, it appears to me that the second illustration put forward by Lord Parker could not be regarded as a true illustration of the application of the rule in *In re Hallett's Estate* (1) but as being a statement of the law either in extension of or in addition to that rule. I am clear that in neither of the paragraphs (2) which I have been considering, nor in any other part of his speech did Lord Parker intend to do anything except apply the existing rules of equity, and certainly did not intend, by means of a hypothetical example, to cast any doubt upon the rule of equity that the identity of trust money paid by a recipient thereof into his banking account and there mixed with his own moneys can be preserved (and, as I think, can only be preserved), if it be shown that at the time of payment in that recipient was clothed with a fiduciary character. I think that the correctness of this conclusion is illustrated by reference to a subsequent passage in Lord Parker's speech, which I have already read, namely, his statement of the equity involved in the *Grace-Calvert* case (3).

I can find nothing in the speech of Lord Sumner which would support the plaintiffs' contention. I need not quote from the speech in any detail. In the last paragraph he says (4): "My Lords, I agree, without recapitulating reasons, that the "principle on which *Hallett's* case (1) is founded justifies an "order allowing the appellants to follow the assets, not merely "to the verge of actual identification, but even somewhat "further in a case like the present, where, after a process of "exclusion, only two classes or groups of persons, having equal "claims, are left in and all superior claims have been eliminated. "Tracing in a sense it is not, for we know that the money "coming from A went into one security and that coming "from B into another, and that the two securities did not "probably depreciate exactly in the same percentage, and we "know further that no one will ever know any more. Still

(1) 13 Ch. D. 696.

(2) [1914] A. C. 398, 442, 443.

(3) Ibid. 444.

(4) Ibid. 459.

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" I think this well within the ' tracing ' equity, and that among " persons making up these two groups the principle of rateable " division of the assets is sound."

The effect of that paragraph, as I understand it, is that on the facts of the case Lord Sumner was of opinion that the first part of the rule in *In re Hallett's Estate* (1) applied, so as to allow entry into the mass, namely, because of the existence of the fiduciary relationship in which the directors of the society stood, but that in the special circumstances of the case the second part of the rule did not apply. This is entirely consistent with his observation on the previous page (2): " In my opinion, if " precedent fails, the most just distribution of the whole must " be directed, so only that no recognized rule of law or equity " be disregarded.'

Lord Sumner was not concerned, and it is, I think, plain that he was not dealing with the effect on the continued identity of trust moneys of an innocent recipient paying them into his banking account and there mixing them with his own.

In my judgment, therefore, the case of *Sinclair* v. *Brougham* (3) cannot be regarded as an authority which casts any doubt on the rule of equity that, where trust moneys are paid by a recipient thereof into his banking account and there mixed with his own moneys (in which event the identity of the trust moneys is lost in fact) their identity will be preserved in the eye of equity, if, at the time of payment in the recipient can be said to be a fiduciary agent.

It was urged on me by counsel for the plaintiffs that if I should come to the conclusion to which I have come, that the authorities do not support their claim to trace the trust moneys into the banking accounts of the defendant institutions, in cases where the trust moneys have been mixed in such accounts with the moneys of the respective defendant institutions, yet on principle I should allow their claim to trace. I cannot see how I can accede to that submission. I regard the decision in *In re Hallett's Estate* (1) as extended and refined by the decided cases to which I have referred, as laying down the extent to which equity will allow the tracing of trust money into a banking account, where it is mixed with other moneys, and as requiring, as an essential condition precedent to allowing entry into the banking account, that it be shown that the person into whose account the trust moneys have been paid was, at the date of payment in, a fiduciary agent. If that be correct, then

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(1) 13 Ch. D. 696.

(2) [1914] A.C. 398, 458.

(3) Ibid 398.

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it follows that to allow tracing into that account, when it cannot be shown that at the date of payment in the payer was a fiduciary agent, would involve disregarding altogether an essential element upon which the reasoning of the judgments in *In re Hallett's Estate* (1) proceeded. But the decision in that case is a decision of the Court of Appeal and is binding on me.

I have not failed to have regard to the well known passage from the judgment of Sir George Jessel M.R. in *In re Hallett's Estate* (2), where he refers to the modern rules of equity. "Therefore, the moment you establish the fiduciary relation, "the modern rules of equity, as regards following trust money, "apply. I intentionally say modern rules, because it must not "be forgotten that the rules of courts of equity are not, like "the rules of the common law, supposed to have been "established from time immemorial. It is perfectly well known "that they have been established from time to time—altered, "improved, and refined from time to time." The authorities following on *In re Hallett's Estate* (1) were exhaustively canvassed before me, and I have referred to them, so far as I have considered necessary, earlier in this judgment. They appear to me to bear out this, that it is still as necessary to-day, as it was in 1879, to establish the fiduciary relation before the modern rules of equity, as regards following trust money, apply; from which it appears to me to follow that if before the time the fiduciary relation is established the trust money has been mixed in a banking account with other moneys, it would be wholly at variance with the reasoning of the judgments in *In re Hallett's Estate* (1) to hold that anything remained which could be the subject of tracing.

Taking that view of the matter, I cannot discover any principle helpful to the plaintiffs which I could apply, which would represent a legitimate extension of, as opposed to a departure from, the basic principle upon which the decision in *In re Hallett's Estate* (1) is founded. The principle for which the plaintiffs' counsel contend is a perfectly simple and intelligible one, but in the view which I take of the authorities it is one which, if it is to be established, must (if I may say so with respect) be established by a higher court.

I therefore hold that the plaintiffs are not entitled to trace into any banking account of any of the defendant institutions into which the moneys paid to such defendant institution by the executors were paid and there mixed with moneys of that defendant institution.

(1) 13 Ch. D. 696. (2) Ibid. 710.

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In coming to this conclusion, I am fortified by the observation of Maugham J. (as he then was) in his considered judgment in *In re Blake* (1), where he says: "The old doctrine "as to the impossibility of following money into the hands of a "volunteer has been largely encroached upon by more modern "decisions, especially in cases where the trustee is the defendant. "I have, however, been unable to find any case in which a claim "to follow money in the hands of a volunteer (not being the "original trustee or his bankers) has been successfully made, "and I doubt whether, at any rate when the money is paid over "pursuant to an order of the court, such an action would lie, "quite apart from lapse of time, and this apart, also, in such "a case as the present, from the operation of the rule in "*Clayton's* case (2)."

The question was canvassed before me as to how the banking accounts should be unravelled, and how the moneys paid by the executors should be traced through and out of the accounts. In view, however, of the conclusion to which I have arrived, that the plaintiffs are not entitled to enter the accounts, this further question does not arise. I would only observe that even if the plaintiffs had succeeded in establishing a right to trace into the accounts, I cannot see upon what principle they would have been entitled to invoke the second part of the rule in *In re Hallett's Estate* (3) which, equally with the first part of the rule, depends on the existence of a fiduciary relationship at the time of payment in of the moneys sought to be traced—for without the existence of that fiduciary relationship, there would be no ground upon which there could be imputed to the person effecting the payment in that intention at the time of payment in and thereafter, upon which the machinery of tracing established by the second part of the rule essentially depends.

Further, it appears to me, as at present advised, that to apply the second part of the rule in *In re Hallett's Estate* (3) against a person, who, when he received the money sought to be traced, was not a fiduciary agent, would be to go against the whole weight of the reasoning in the speeches in *Sinclair* v. *Brougham* (4), and to give the tracer that priority, which, as I understand his language, Lord Parker would have denied him (5).

Baggallay L.J. in *In re Hallett's Estate* (6) said: "It may,

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(1) [1932] 1 Ch. 54, 63.
(2) 1 Mer. 572.
(3) 13 Ch. D. 696.
(4) [1914] A. C. 398.
(5) Ibid. 442, 443.
(6) 13 Ch. D. 696, 743.

"of course, happen that, through the acts of a trustee, whether "wilfully dishonest or not, the ultimate balance may not be "sufficient to meet the full amounts of all the trust moneys "which may have been paid into a blended banking account, "and the question then raised may be as to the various claims "in respect of distinct trusts; in such a case the strict application of the general rule of appropriating in order to date "the drawings out to the payments in may, and probably would "be correct." How far this view can be reconciled with the reasoning of the House of Lords in *Sinclair* v. *Brougham* (1) is a question which may one day have to be decided. It may be that the answer is that in a case involving a banking account in which more than one trust fund has been mixed, and where the facts make it practicable to do so, the rule in *Clayton's* case (2) would be applied; while on the other hand in a case of which *Sinclair* v. *Brougham* (1) is an example, where it is not on the facts practicable to apply the rule in *Clayton's* case (2), the principle of division upon which the House of Lords proceeded in *Sinclair* v. *Brougham* (1) would be applied instead. On this aspect of the matter, however, I do not desire to express any concluded view.

There are two further points advanced on behalf of the plaintiffs to which I should refer. It was contended on their behalf that, wherever it could be shown that the money paid by the executors to the respective defendant institutions had been applied in the discharge of a just debt then owing by such institution, the plaintiffs were entitled to be recouped the amount so applied. This proposition was sought to be rested on the authority of *Trevillian* v. *Exeter Corporation* (3), the headnote of which is as follows: "A corporation raised money "under an Act of Parliament on mortgages of the tolls and "additional works of a canal, and, acting on what the Court of "Appeal (differing from the court below) decided to be an "erroneous construction of the Act, applied part of the money "so raised in paying off old mortgages affecting other property "of the corporation. On the tolls and additional works proving "an insufficient security: Held, that the new mortgagees were "entitled to follow their money so far as it had been erroneously "applied, and to stand in the place of the old paid-off "mortgagees as against the other property of the corporation."

Turner L.J. said (4): "This application, not being a purpose

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(1) [1914] A. C. 398.

(2) 1 Mer. 572.

(3) (1854) 5 De G. M. & G. 828.

(4) Ibid. 834.

"warranted in the opinion of the court by the Act of Parliament, and the moneys so applied being in the opinion of the "court trust moneys, the consequence must be that there was a "lien upon those estates for the amount of the moneys which "had been so applied, subject to this restriction that, so far "as those estates had been parted with by the corporation, "and purchasers had acquired a title without notice of that "lien, such a title could not, of course, be affected in this suit. "Therefore, the court could only give effect to the lien upon the "estates of the corporation included in the prior mortgages so "far as those estates remained in the hands of the corporation."

This case appears to me to be no more than a simple instance of the application of the equitable doctrine of tracing and to establish this, that, where a trustee in breach of trust applies trust moneys in paying off a mortgage on his own property, equity will not allow him to assert any interest in the property, so freed from the mortgage, until the trust moneys have been recouped, and for that purpose will regard the property as charged in favour of the person entitled to the trust moneys to the extent thereof in place of the mortgagee. It does not appear to me to be an authority for the proposition that where an unsecured debt is discharged out of trust moneys, equity, as part of the doctrine of tracing will order recoupment. The fact is that the debt is extinguished and the trust fund to that extent dissipated, and to order recoupment by the trustee would involve the imposition of a personal liability, and not the enforcement of a right in rem. The right in rem can only exist where property continues to exist into which the trust moneys can be shown to have gone, as in *Trevillian* v. *Exeter Corporation* (1).

I am further of opinion that the result is no different if the debt which is discharged is a secured debt, where, as in the present case, the person receiving the money and applying it in discharge of the debt, was not fixed with notice of a trust affecting such money when he received it and when he applied it in discharging the debt. The security, whatever form it takes, is created and continues to exist for the sole purpose of securing the debt. But if the debt be extinguished, the security must go, for there is no longer any reason for its continued existence. Suppose in the circumstances postulated above, the debtor calls for and obtains by whatever means may be appropriate, the re-vesting in him of the property charged free from the charge;

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(1) 5 De G. M. & G. 828.

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and suppose later a claim is made upon the basis that, unknown to the debtor, the money which he received and applied in discharging the debt was trust money, then upon the assumption that my conclusion, which I have stated above, that the debt is extinguished, is correct, by what process of reasoning can it be said that the charge, which in fact has been effectively extinguished, is alive? In order, in such circumstances to affect the property, which once was but has ceased to be charged, it would be necessary either to revive the charge or to hold, contrary to the fact, that it had never been extinguished. I can find no satisfactory line of reasoning on which it could be alleged that the charge could be revived, or deemed to be revived, and I can see no ground upon which the charge ought to be deemed never to have been brought to an end, where the person receiving and expending the moneys in question was at no material time fixed with knowledge that they were trust moneys.

Is the position then any different in a case where the debt has been paid off but the conveyancing steps necessary for extinguishing any estate in the mortgagee in the property charged have not been completed at the time when the claim is presented? In my view the answer is that the position is no different. In such a case, the debtor as between himself and the secured creditor is beneficially absolutely entitled in equity to the property charged; and I am unable to see how the person seeking to follow or trace the money can, as regards the property charged, be in any better position than the creditor. In my view, the state of knowledge of the debtor when he received and applies the money is the crux of the matter.

Again, the decision in *Trevillian* v. *Exeter Corporation* (1) was one involving an express trustee, and is no authority against a person who is in no sense a fiduciary agent at the time of expenditure of the trust moneys. His liability must be confined to what can be followed into and shown to remain in his hands at the time he first becomes clothed with a fiduciary character.

But apart from the above objections, there is a fatal difficulty which prevents the plaintiffs from relying on *Trevillian* v. *Exeter Corporation* (1), if the conclusions to which I have arrived on the question of tracing are correct. *Trevillian* v. *Exeter Corporation* (1) is, as I have pointed out, a case of tracing. Even if the view of the case put forward by the plaintiffs were

(1) 5 De G. M. & G. 828.

right, they could only pray it in aid, if they first established not only the right to trace into, but through and out of the various banking accounts. This right they have not, in my judgment, succeeded in establishing, and therefore *Trevillian* v. *Exeter Corporation* (1) can have no application.

In their argument upon this part of the case counsel for the plaintiffs sought to rely on three passages in *Sinclair* v. *Brougham* (2). The first passage is from the speech of Lord Dunedin where he says (3): " but if the thing has so dis-" appeared that a jus in re is no longer to be found (and this " must practically always be so in the case of money) then " your remedy is gone. The sole relief which equity can " give is that if you can show that your money has paid a just " debt, in that case you shall have action." The second passage is from the same speech (4): " Equity—I am not speaking of " technical equity—has already found itself able, in the exercise " of its auxiliary jurisdiction, as the respondents admit, to " deal with the situation when the money has gone to pay a " just debt." I must, however, read the next few lines. " Is " its action limited to that situation? I think not. I think " it can always, in the exercise of the same jurisdiction help the " common law by tracing."

The third passage is from the speech of Lord Parker where he says (5): " Accepting the principle that no action or suit lies " at law or in equity to recover money lent to a company or " association which has no power to borrow, the question " remains whether the lender has any other remedies. On this " point the result of the authorities may be stated as follows: " First, it appears to be well settled that if the borrowed money " be applied in paying off legitimate indebtedness of the " company or association (whether the indebtedness be incurred " before or after the money was borrowed), the lenders are " entitled to rank as creditors of the company or association to " the extent to which the money has been so applied. There " appears to be some doubt as to whether this result is arrived " at by treating the contract of loan as validated to the extent " to which the borrowed money is so applied, on the ground that " to this extent there is no increase in the indebtedness of the " company or association, in which case, if the contract of loan " involves a security for the money borrowed, the security would " be validated to a like extent; or whether the better view is

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(1) 5 De G. M & G. 828.
(2) [1914] A. C. 398.
(3) Ibid. 435.
(4) Ibid. 436.
(5) Ibid. 440.

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"that the lenders are subrogated to the rights of the legitimate "creditors who have been paid off. See the case of *Blackburn* "*Building Society* v. *Cunliffe Brooks & Co.* (1), the case of "*Wenlock* v. *River Dee Co.* (2), and the case of *In re Wrexham,* "*Mold and Connah's Quay Ry. Co.* (3). It is still open to your "Lordships' House to adopt either view, should the question "actually come up for determination."

Again, I must read a further sentence: "Secondly, it appears "to be also well settled that the lender in an ultra vires loan "transaction has a right to what is known as a tracing order."

In my view these passages make it clear first, that Lord Dunedin and Lord Parker were treating the right which they were discussing as something which was alternative to and not part of the remedy of a tracing order; and secondly, that they were considering this right solely in relation to a transaction of ultra vires borrowing. These passages, therefore, do not appear to me to assist the plaintiffs' case. Further, it is to be observed that although, as Lord Parker pointed out, it is still open to the House of Lords to adopt the view that the right is based on subrogation, the weight of present authority is the other way and binds me. In addition to the cases cited by Lord Parker reference may be made to White and Tudor's Leading Cases in Equity, 9th ed., vol. 1, pp. 148 and 149.

The second matter to which I must refer is the argument advanced by the plaintiffs that where, as happened in more than one of the cases before me, the recipient defendant institution, treated in its accounts money or securities as representing the moneys received by it from the executors, that circumstance amounted to an earmarking of such moneys so as to preserve their identity, and thus to allow the plaintiffs to claim the money or assets so said to be earmarked. The alleged right was, and must be, rested on the common law right of following assets and not on the equitable doctrine of tracing, for the alleged earmarking took place at a time when the defendant institutions concerned were not fiduciary agents. In each of the cases involved, however, the money received from the executors was first mixed in the banking account of the defendant institution, before the alleged earmarking took place, and this circumstance appears to me to preclude the plaintiffs from asserting that what the defendant institution treated in its books as representing the money received from the executors was in fact such money, or was in fact an asset into which that money had been converted. In fact, the money received from the executors lost its identity for ever upon being mixed in the banking account with other moneys of the defendant institution; there was no duty upon the defendant institution to preserve the identity; there could be no obligation upon it to revive the identity, because that would be impossible; and finally, no question of estoppel is involved. All that happened was that for its own internal purposes the defendant institution treated as representing the moneys received from the executors an aliquot part of its financial resources with which those moneys had already been mixed.

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(1) (1882) 22 Ch. D. 61.

(2) (1885) 10 App. Cas. 354.

(3) [1898] 2 Ch. 663; [1899] 1 Ch. 440.

It may be convenient if, at this point, I pause to sum up the position as regards the claims to follow and to trace. First, in every case where a defendant institution paid the money received by it from the executors into an account at its bankers where it was mixed with other moneys of that defendant institution, the right to follow the money at law ceased, because the means of identification failed.

Secondly, in no such case can the plaintiffs invoke the equitable doctrine of tracing and enter the account, because at the time of payment in there was not that fiduciary relationship in existence, which would otherwise have given the plaintiffs the right first to maintain that the defendant institution could not claim any interest in the mixed moneys standing to the account after payment in of the moneys received from the executors, until those latter moneys had been recouped to the estate of the testator, and therefore secondly to claim a charge upon the whole of the mixed moneys to secure such recoupment.

Thirdly, for the same reason, namely, the absence of any fiduciary relationship prior to the receipt of the warning letters, the plaintiffs are not entitled to trace through the account, because there cannot be imputed to the defendant institution that intent, by means only of which the identification of the moneys received from the executors could be artificially preserved in equity.

Fourthly, for the same reason the plaintiffs cannot trace the moneys received from the executors out of the account with a view to showing that an asset still held by the defendant institution was acquired in whole or in part out of the moneys received from the executors.

Fifthly, where a defendant institution paid the money into a separate account and that money was never mixed with any moneys of the defendant institution, the plaintiffs can follow into that account: where there are still moneys standing to the credit of the account, they can claim to have such moneys paid over to them: and where assets can be shown to have been purchased wholly with moneys from that account, they can claim the transfer to them of those assets; but where identification in fact is impossible, as where for example the asset into which the money sought to be followed, was purchased partly with the moneys in the separate account and partly with other moneys of the defendant institution; or where, as for example, the money has been expended in erecting buildings on land owned by the defendant institution or altering an existing building, the right to follow is lost.

Sixthly, where a defendant institution paid money into a separate account and that money was never mixed with any money of the defendant institution, then, as from the date of the warning letter in question, the defendant institution became a trustee of any money then standing to the credit of that special account, and, as an alternative to the common law right of following into the account, the plaintiffs as from the date of the warning letter can claim to trace into and through and out of the account in accordance with the principles to which I have already referred. In such a case, therefore, they can claim a charge on any moneys still standing to the credit of the separate account and upon any assets still held by the defendant institution into which moneys paid out of the separate account since the date of the warning letter can be shown to have gone, in accordance with the principles to which I have already referred.

On the other hand, however, where after the date of the warning letter moneys have been paid out of the separate account in discharging unsecured debts of the defendant institution, the trust moneys must be considered to that extent to have been dissipated, except that, where a defendant institution agreed with the executors to expend money for a particular purpose, for example, for altering an existing building or erecting a new one, all moneys expended after the date of the warning letter in discharging liabilities incurred in connexion with such alteration or erection, whether such liabilities were incurred before or after that date, must be considered as represented in and traceable into the building and the plaintiffs are entitled to a charge thereon to the amount of such moneys.

I must now refer to certain special defences, which were raised on behalf of certain of the defendant institutions. The first of these was estoppel. I can dispose of this matter quite shortly, because in those cases where the defence was raised, it was only sought to pursue it, if and to the extent that it should be held that the particular defendant institutions were under any personal liability to repay any part of the moneys received by them respectively from the executors. As I have held that none of the defendant institutions are under any personal liability, it is unnecessary for me to pursue this matter further.

The second special defence to which I must refer is that which is put forward on behalf of a number of the defendant institutions, who claim that on the particular facts of their respective cases, they are entitled to be regarded not as volunteers, but as being in the position of purchasers for value without notice. The cases concerned are the cases in which Leaf Homœopathic Hospital, Queen Alexandra's Cottage Homes and Guy's Hospital are involved.

The defendants relied on a number of authorities to two of which I propose to refer: In *Dillwyn* v. *Llewelyn* (1), the facts were that: " A father placed one of his sons in possession of " land belonging to the father, and, at the same time, signed a " memorandum that he had presented the land to the son for " the purpose of furnishing him with a dwelling-house. The " son, with the assent and approbation of the father, built at " his own expense a house upon the land and resided there. " Held, that this was not a mere incomplete gift, but that the " son was entitled to call for a legal conveyance, and not " merely of a life-estate, but of the whole fee-simple."

Lord Westbury L.C. in the course of his judgment, said (2): " A voluntary agreement will not be completed or assisted by a " court of equity, in cases of mere gift. If anything be wanting " to complete the title of the donee, a court of equity will not " assist him in obtaining it; for a mere donee can have no right " to claim more than he has received. But the subsequent " acts of the donor may give the donee that right or ground of " claim which he did not acquire from the original gift. Thus, " if A gives a house to B, but makes no formal conveyance, " and the house is afterwards, on the marriage of B, included, " with the knowledge of A, in the marriage settlement of B, " A would be bound to complete the title of the parties " claiming under that settlement. So if A puts B in possession

(1) (1862) 4 De G. F. & J. 517.

(2) Ibid. 521.

"of a piece of land, and tells him, 'I give it to you that you "'may build a house on it,' and B on the strength of that "promise, with the knowledge of A expends a large sum of "money in building a house accordingly, I cannot doubt that "the donee acquires a right from the subsequent transaction to "call on the donor to perform that contract and complete "the imperfect donation which was made." Later, his Lordship said (1): "The only inquiry therefore is, whether the "son's expenditure on the faith of the memorandum supplied a "valuable consideration and created a binding obligation. "On this I have no doubt; and it therefore follows that the "intention to give the fee-simple must be performed, and that "the decree ought to declare the son the absolute owner of the "estate comprised in the memorandum."

In *Taylor* v. *Blakelock* (2) the facts were that: "C, trustee "with the plaintiff of a will, and also trustee with the defendant "of a settlement, having misappropriated a portion of the "settlement fund, applied an equal portion of the will fund in "the purchase of stock, which he transferred into the names of "himself and the defendant. The plaintiff and defendant were "both innocent of C.'s fraud, and the defendant and the cestuis "que trust under the settlement had no notice that the stock "was purchased with part of the will fund. C. died insolvent. "In an action by the plaintiff to compel the defendant to "transfer the stock to him: Held, by the Court of Appeal "(affirming the judgment of Bacon V.-C.), that the defendant "having by accepting the transfer of the stock given up his "right to sue C for his debt to the trust, was entitled to be "treated as a purchaser for value without notice, and consequently to retain the stock as part of the settlement fund."

Cotton L.J. said (3): "Now on what ground does the plaintiff "seek to get it back from him? He says 'this was purchased "'with or was my trust fund, and as I have identified it I have "'a right to follow it.' But can he do so in this case? If the "defendant held it simply as a transferee without any consideration, of course he would stand in no better position than "the transferor; that is to say, as the fund in the hands of "Carter would have been subject to the trusts of the Gyhon "will, anyone who took it from him simply as a volunteer "could not say that he had any better title, and would still be "bound by the trusts of the Gyhon will. But is that the posi-

(1) 4 De G. F. & J. 517, 522.
(2) (1886) 32 Ch. D. 560.
(3) Ibid. 568.

"tion here of the defendant? At the time when this transfer "was made to him, when this fund got into his name, he had a "right to sue his co-trustee for the purpose of getting that "money, which had got into his hands or into the hands of his "firm; either way Carter would have been liable. When he "took the transfer of this stock into the name of himself and "of Carter he, by accepting the transfer, lost and put an end "to the right of action which he had as against Carter in order "to make him bring back this fund, and invest it for the "purposes of the Pearson settlement. Therefore he gave up by "accepting this stock a valuable right. He gave valuable "consideration just as much as if he had actually parted with "money; for he gave up, lost, parted with the right to sue "Carter, which up to the time when this stock was transferred "he had. In my opinion, independently of any question of "pressure, that was valuable consideration, and prevents it "being alleged on the part of the plaintiff, or those cestuis que "trust whom he represents, that Blakelock holds this debenture "stock in the same position as Carter did."

Bowen L.J. said (1): "Blakelock has got a legal right to this "property, and why on earth is it to be taken away from him? "It can only be taken away from him on the ground of some "breach of trust which affects it. No doubt if he had notice, "then his legal title would disappear, would be invalidated. "If he was a volunteer he could not stand in a better position "than the person who conveyed to him; but if he is not a "volunteer, upon what principle can you take away his "property? That really reduces it to the simple question of "what is the meaning of the term 'a purchaser for value' "in such cases. 'A purchaser for value' is a well known "expression to the law. By the common law of this country "the payment of an existing debt is a payment for valuable "consideration. That was always the common law before the "reign of Queen Elizabeth as well as since. Commercial "transactions are based upon that very idea. It is one of the "elementary legal principles, as it seems to me, which belong "to every civilized country; and many of the commercial "instruments which the law recognizes have no other consideration whatever than a pre-existing debt. The man who "has a debt due to him, when he is paid the debt has converted "the right to be paid, into actual possession of the money; "he cannot have both the right to be paid and the possession

(1) 32 Ch. D. 560, 569.

" of the money. In taking payment he relinquishes the right " for the fruition of the right. In such a case the transaction " is completed; and to invalidate that transaction would be to " lull creditors into a false security, and to unsettle business," and Fry L.J. concurred.

Now those two authorities appear to me to establish that, in order to enable a defendant to set up the plea of purchaser for value, it is unnecessary for him to assert and prove that the transaction in regard to which he desires to set up the plea was a contract of sale and purchase in the strict sense. It is, in my judgment, sufficient if he can show that the transaction consisted in the transfer or handing over to him of property by the plaintiff or some person through whom the plaintiff claims, and that there should move from the defendant (not necessarily to the plaintiff) some consideration valuable in the eye of the law, for example, the suffering by the defendant of some detriment. In neither of the cases referred to was there involved a sale and purchase within the strict meaning of the term.

Further, it does not appear to me to matter, for the purposes of the plea, what is the nature of that which is transferred to the defendant. In *Dillwyn* v. *Llewelyn* (1) that which was transferred was land; in *Taylor* v. *Blakelock* (2) it was debenture stock. I can see no reason in principle, however, why that which is transferred to the person seeking to set up the plea should not be money, as in the present case.

The crux of the matter in each case is the question did valuable consideration move from the defendant institution concerned? In each of the cases with which I am concerned, the executors imposed a condition as to how the money was to be applied by the defendant institution. The acceptance of this condition and the act of the defendant institution in applying the money in accordance with the condition does not of itself appear to me to result in the giving of consideration by the defendant institution. In the case of Leaf Homœopathic Hospital, the condition was that the money should be applied in paying off a building debt and for general purposes. The money was received and applied for these two purposes. This involved no dealing by the Leaf Homœopathic Hospital with its moneys or other property and the suffering of no detriment. The transaction appears to me to have amounted to no more than a gift of money, subject to a condition as to the disposal of the money.

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(1) 4 De G. F. & J. 517.

(2) 32 Ch. D. 560.

It is pointed out that the executors also made it a term of the gift that the hospital authorities should procure that the men's ward should be designated in future as "the Diplock Ward," and it was sought to be argued that the imposition of this term, and its acceptance by the hospital, constituted sufficient consideration moving from the hospital to sustain the plea of purchaser for value without notice. In my judgment, however, the gift, despite the term in question, remained a gift. In the case of the Leaf Homœopathic Hospital, therefore, I am of opinion that the plea of purchaser for value is not established.

The other two cases stand on a different footing in one respect. Paragraph 18 of the agreed statement of facts in the case of Queen Alexandra Cottage Homes reads: "It was the "intention of all parties that the new homes should be erected "on land already belonging to the charity and this was done." So that, as was urged on behalf of this defendant, it was an essential part of the transaction that the defendant institution in question should use in a particular way not only the money to be received from the executors but its own property. Again, in the case of Guy's Hospital, it was urged that it was an essential part of the transaction, under which the money was received from the executors, that Guy's Hospital should devote part of its property to the accomplishment of the object, the attainment of which was made by the executors a condition of the payment of the money in question.

That is true, but in each case that which was to be done to or in regard to the property of those respective defendants was to be done wholly with the money to be paid by the executors, and must result wholly to the advantage of those respective defendants. In those circumstances, the acts of those defendants in subjecting their properties, in the one case to the erection of a building and in the other case to the alteration of a building, do not appear to me to involve in either case the suffering of a detriment. In my judgment, therefore, neither of those defendants is in the position of a purchaser for value.

Upon this view, it becomes unnecessary for me to consider the question of notice. Nevertheless, I think that I ought shortly to advert to the argument put forward on behalf of the plaintiffs on this point.

It was submitted by the plaintiffs that, notwithstanding their admission that for the purposes of the application of the doctrine of tracing they could not assert that the defendant institutions became trustees or in any degree fiduciary agents prior to the receipt of the warning letters, nevertheless they were sufficiently fixed with notice to prevent them from relying on the plea of purchaser for value without notice. This was said to be the case, because the defendant institutions, knowing that they were dealing with executors, who were proposing to make payments under a discretionary power in their testator's will, the substance and effect of which was communicated to them, were put on inquiry as to the validity of the power given to the executors by the will.

I am unable to follow this reasoning. In the first place it is necessary to remember that that which the executors handed over was money, and as Lord Haldane L.C. said in *Sinclair* v. *Brougham* (1): "When sovereigns or bank notes are paid over "as currency, so far as the payer is concerned, they cease "ipso facto to be the subjects of specific title as chattels. "If a sovereign or bank note be offered in payment it is, under "ordinary circumstances, no part of the duty of the person "receiving it to inquire into title. The reason of this is that "chattels of such a kind form part of what the law recognizes "as currency, and treats as passing from hand to hand in "point, not merely of possession, but of property."

In the second place it must be remembered that the plea of purchaser for value without notice is one which, if established, is effective to halt the operation of the equitable doctrine of tracing: see *Collins* v. *Stimson* (2). It follows that if at the time of the transaction in regard to which the plea is raised, the defendant can show that he had not such notice as would make him a trustee or a fiduciary agent for the purpose of the doctrine of tracing in equity, it necessarily follows that he was also sufficiently without notice to allow him to rely on the plea of purchaser for value without notice. Apart from this consideration, which appears to me to conclude the matter, I cannot see that anything other than confusion would result, if there were as regards notice two different tests, one which would decide whether a man was a trustee or fiduciary agent for the purposes of the equitable doctrine of tracing, and another for the purposes of the plea of purchaser for value without notice.

A further defence raised by certain of the defendant institutions, of which the case of Guy's Hospital forms an example, was that where a defendant institution held the property,

(1) [1914] A. C. 398, 418.

(2) (1883) 11 Q. B. D. 142.

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into which it was sought to trace and on which an equitable charge was claimed, upon charitable trusts, there was nothing held by such defendant institution which could be the subject of such a charge. I do not accept the proposition. In so far as under this judgment the plaintiffs have a right of tracing, that right exists because the body in which the property is vested, or by whom the property is held into which it is sought to trace, is to be treated as standing in a fiduciary relationship to the plaintiffs and cannot assert any interest in the property, until the burden, cast on it by reason of such fiduciary relationship, has been discharged. No one claiming through the body in question can be in a better position in this regard than the body itself, and therefore no one can assert an equity competing with the plaintiffs' equity.

A special defence was raised on behalf of the defendants Chichester Diocesan Fund and Board of Finance (Incorporated). Having regard, however, to the views which I have expressed earlier in this judgment, it does not become necessary to consider this defence.

The last matter to which I must refer is the plea raised by a number of the defendants of the Statutes of Limitation. When this question came to be argued, it was made plain on behalf of all the defendants concerned that they only desired to rely upon this plea so far as concerned the plaintiffs' claims in personam, and that in so far as it should be held that any claim against them in rem, that is to follow at common law or to trace in equity, succeeded, they did not desire to rely upon any Statute of Limitation. I have already earlier in this judgment expressed the conclusion that the plaintiffs are not entitled to succeed upon either of their claims in personam. In these circumstances, it becomes unnecessary for me to express any view upon the applicability of the Statutes of Limitation in the present proceedings, and I refrain from doing so.

Solicitors: *White & Leonard; Thomas Eggar & Son, Eland, Nettleship & Butt; Trollope & Winckworth; Peake & Co.; Freshfields; Treasury Solicitor.*

B. A. B.

END OF VOL. AND OF CHANCERY SERIES FOR 1947.

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2. —— *Charity — Testatrix a member of and missionary belonging to "the Brethren" —Bequest to "Editors of . . . . 'Echoes of "'Service' . . . . to be applied . . . . for such "objects as they may think fit"—"Echoes of "Service" designation of a charity as well as title of a magazine—Editors, treasurers and trustees of churches of "the Brethren"—"For "such objects" — Meaning — Validity of bequest.*
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4. —— *Construction — Annuity — Protective trusts — "Paid without deduction of "income tax up to a maximum of five shillings "in the pound"—Reliefs and allowances of annuitant—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19 (1) *and* 21 (1).
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